SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 527

THE HANNA MINING COMPANY, ET AL., PETITIONERS,

vs.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

INDEX

	Original	Print
Proceedings in the Supreme Court of Wisconsin	A	1
Appellants' appendix consisting of portions of the record from the Circuit Court for Douglas County, Wisconsin	1	1
Memorandum opinion	1	1
Order from which appeal is taken	7	5
Original complaint	9	6
Order to show cause	20	13
Affidavit of Howard F. Andrews	22	14
Affidavit of Robert J. McDade	25	16
Exhibit A—Letter from National Labor Relations Board to Robert J. McDade dated November 20, 1962	46	29
Exhibit B—Letter from the General Counsel of National Labor Relations Board to Robert J. McDade dated December 10, 1962	48	31

RECORD PRESS, PRINTERS, NEW YORK, N. Y., MAY 17, 1965

	Original	Print
Appellants' appendix consisting of portions of the record from the Circuit Court for Douglas County, Wisconsin—Continued		
Affidavit of Robert J. McDade—Continued		
Exhibit C—Letter from the Regional Director of National Labor Relations Board to The Hanna Mining Company dated October 5, 1962	51	34
Exhibit D—Letter from the General Counsel of National Labor Relations Board to Robert J. McDade dated November 26, 1962	53	36
Exhibit E—Letter from the General Counsel of National Labor Relations Board to Robert J. McDade dated December 21, 1962	55	37
Affidavit of Stuart W. Sexsmith	56	38
Affidavit of Richard D. Bibby	63	42
Defendants' motion to dismiss complaint	64	43
Affidavit of David Scribner	64	44
Amended complaint	68	46
Exhibits	79	53
Excerpt from charge filed by The Hanna Mining Company with National Labor Relations Board dated September 15, 1962	79	53
Excerpt from charge filed by The Hanna Mining Company with National Labor Relations Board dated September 27, 1962	80	54
Brief submitted in behalf of National Marine Engineers Beneficial Association and District 2, MEBA to General Counsel, National Labor Relations Board	81	54
Letter from the Regional Director of National Labor Relations Board to The Hanna Mining Company dated September 25, 1962	86	57
Letter from the Regional Attorney of National Labor Relations Board to The Hanna Mining Company dated October 16, 1962	88	59
Letters from the Regional Director of National Labor Relations Board to The Hanna Mining Company dated October 22, 1962	90	60

	Original	Print
Appellants' appendix consisting of portions of the record from the Circuit Court for Douglas County, Wisconsin—Continued		
Exhibits—Continued		
Letter from the Regional Attorney of National Labor Relations Board to The Hanna Mining Company dated October 16, 1962	94	63
Judgment	104	65
Opinion, Fairchild, J.	105	66
Order denying motion for rehearing	117	77
Clerk's certificate (omitted in printing)	118	77
Order allowing certiorari	119	77

[fol. A]

IN THE SUPREME COURT OF WISCONSIN

THE HANNA MINING COMPANY, NATIONAL STEEL CORPORATION, HANSAND STEAMSHIP CORPORATION and THE HANNA FURNACE CORPORATION, Appellants,

v.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, Respondents.

[fol. 1]

Appellants' Appendix

IN THE CIRCUIT COURT FOR DOUGLAS COUNTY, WISCONSIN

MEMORANDUM OPINION—July 25, 1963

The dispute in the above case arose from the picketing of an ore carrying boat in the harbor of Superior, Wisconsin. The operator of the boat is the Hanna Mining Company, a Delaware Corporation with its principal office and place of business at 1300 Leader Building, Cleveland 14, Ohio, and the organization doing the picketing was District 2 of the Marine Engineers Beneficial Association, AFL-CIO, 190 21st Street, Brooklyn 32, New York, an unincorporated association. Said association, hereinafter designated "MEBA," has been picketing all boats owned by said Hanna Company wherever they appear on the Great Lakes since September of 1962. All unlicensed personnel employed by the Hanna Company are represented by the United States Steel Workers of America, Local 7000, AFL-CIO, and they are not involved in this matter and apparently take no cognizance of the picketing by MEBA. The object of the picketing by MEBA is to organize the licensed personnel on Hanna boats, the engineers.

On the 25th day of June, 1963, an order was issued by this Court temporarily restraining said picketing, said or-
[fol. 2] der being returnable at 10:00 o'clock on the 1st day of July, 1963. The hearing on said matter was postponed by agreement of counsel to the 8th day of July, 1963, at 10:00 o'clock a. m. and on said date argument was held, the plaintiffs being represented by Johnson, Fritschler, Barstow and Witkin, Superior, Wisconsin, by B. B. Barstow and Paul Witkin, Montague, Applequist, Lyons, Nolan, Donovan and Kretsch, Duluth, Minnesota, by Kermit Kretsch, and by Hanninen, McGreary, Hinslea and Ray, Cleveland, Ohio, by John Hanninen. The defendants were represented by Borg, McGill and Moodie, Superior, Wisconsin, by P. G. McGill, and by Pressman and Scribner of New York, New York, by David Scribner.

The first issue to be decided in this case, as it is in every case in which a state court is involved in a labor matter, is whether the state court has jurisdiction over the matter at all, or whether the matter is within the jurisdiction of the National Labor Relations Board, and the argument had on July 8, 1963, was restricted to such point. The facts in this case to begin with seem to be very similar to the facts in Marine Engineers Beneficial Association vs. Interlake Steamship Company, 370 U. S. 173, decided by the Supreme
[fol. 3] Court on June 11, 1962. That was a case in which the same defendant as here involved was picketing a ship in the harbor in Duluth, Minnesota in the same manner as was done in this case. The District Court in Duluth issued a restraining order restraining such picketing just as was done in this case. The union appealed the case to the Minnesota Supreme Court and the Minnesota Supreme Court affirmed the lower court. The Minnesota court reasoned that the matter was not within the jurisdiction of the National Labor Relations Board because the persons that MEBA was trying to organize were not employees but were supervisors within the meaning of the National Labor Relations Act, and the National Labor Relations Act does not apply to supervisors. The union appealed the

case to the United States Supreme Court and the United States Supreme Court reversed the Minnesota court. In its reversal the United States Supreme Court quoted extensively from the case of San Diego Building Trades Council vs. Garmon, 3 L. Ed. 2d 775, decided January 20, 1959, in which the court had stated that if any matter was arguably within the jurisdiction of the National Labor Relations Board, then the state court should defer to the National Labor Relations Board, and the initial determination [fol. 4] as to whether such matter was or was not within the jurisdiction of the National Labor Relations Board should be determined by the Board. The court said that because of the fact that plaintiff below had alleged the violations of Section 8(b) (4) of the Act, the provision prohibiting secondary boycotts, such matter might be within the jurisdiction of the National Labor Relations Board. This was because, even though the persons that MEBA was attempting to organize in this particular case were all supervisors, MEBA did have certain members at other locations that were employees, so that MEBA was a labor organization within the meaning of the Act, and any violation of Section 8(b) (4) by a labor organization did come within the jurisdiction of the National Labor Relations Board.

Now we get to the difference between this case and the Minnesota case. The plaintiff in this case tried to follow the advice of the Supreme Court in the Minnesota case. When MEBA began picketing its ships in September of 1962, the plaintiff Hanna Mining Company did not come directly to the state court. It filed charges with the National Labor Relations Board. In fact, it filed two different charges with the National Labor Relations Board, one al- [fol. 5] leging that MEBA had violated Section 8 (b) (4) of the Act and a second, that MEBA had violated Section 8 (b) (7) of the Act, a provision which prohibits organizational picketing except in certain circumstances specified in the Act.

The National Labor Relations Board dismissed the petition alleging violation of Section 8 (b) (4) of the Act, stat-

ing that the activities alleged by MEBA did not violate such section. The National Labor Relations Board also refused to issue a complaint for a violation of Section 8 (b) (7) of the Act, but the reason they gave for failure to issue a complaint in this case was that they could not do so for the reason that the persons MEBA was attempting to organize were all supervisors. They stated that they did not consider whether the particular acts alleged would have been a violation of Section 8 (b) (7) if the persons that MEBA was attempting to organize had been employees, but such persons being supervisors, they were dismissing the complaint. At the time the original restraining order was issued, the Court thought that this declination to act by the Board gave the state court jurisdiction in a case involving supervisors, but after studying labor cases for two weeks, the matter does not appear so simple. The [fol. 6] fact that the National Labor Relations Board declined to act in a particular case does not necessarily give the state court jurisdiction. Further, we do not know the facts in the present case are exactly the same as the case which the National Labor Relations Board investigated in the Fall of 1962 before it issued such order. The complaint in this case, at least, "arguably," alleges facts which would be a secondary boycott, which are within the jurisdiction of the National Labor Relations Board.

The United States Supreme Court has said repeatedly that the state courts should stay out of labor disputes in any case in which there was a possibility that the National Labor Relations Board might have jurisdiction thereof. This means in effect that the state court must stay out of any labor dispute affecting interstate commerce, as this dispute clearly does, unless the United States Supreme Court or the National Labor Relations Board has clearly indicated that the state court may act. The last word from the United States Supreme Court on a matter similar to this is the Minnesota case cited above decided June 11, 1962, in which case the United States Supreme Court said the state court should stay out. The Court cannot say that

the National Labor Relations Board's action since that date [fol. 7] has been so definite and certain as to give the state court jurisdiction in this case.

Therefore, it is determined that the Court does not have jurisdiction in this case, and the restraining order must be vacated and the complaint dismissed with costs. Attorneys for defendants may draw the order.

Dated July 25, 1963.

By the Court: Allen Kinney, Circuit Judge.

IN THE CIRCUIT COURT FOR DOUGLAS COUNTY, WISCONSIN

ORDER FROM WHICH APPEAL IS TAKEN—July 26, 1963

The above entitled matter having come before the Court pursuant to an Order to Show Cause herein dated June 25, 1963, and an Order having been thereon issued by this Court temporarily restraining picketing alleged in the Petition, Affidavits and Complaint on file herein, and said Order being returnable on July 1, 1963, and adjourned by Stipulation to July 8, 1963, on which date plaintiffs having appeared by Johnson, Fritschler, Barstow & Witkin of Superior, Wisconsin, by B. B. Barstow and Paul Witkin, and Montague, Applequist, Lyons, Nolan, Donovan and [fol. 8] Knetsch of Duluth, Minnesota, by Kermit Knetsch, and by Hanninen, McGreary, Hinslea and Ray, Cleveland, Ohio, by John Hanninen, and the defendants specially appearing by Borg, McGill & Moodie of Superior, Wisconsin, by P. G. McGill, and by Pressman and Scribner of New York, New York, by David Scribner, and Motion having been filed by the defendants to dismiss the Complaint and to vacate the temporary restraining order, and the Court having read the Affidavits of the parties and having heard the arguments of counsel and being fully informed in the premises, and the Court having filed its Memorandum Opinion herein, the same having been served on the representative counsel, and the Court finding that the matter now before the Court is within the jurisdiction of the National Labor Relations Board and that this Court is without jurisdiction;

It Is Ordered that the Motion of the defendants to dismiss plaintiff's Complaint is granted and plaintiffs' Complaint is dismissed with costs to defendants.

It Is Further Ordered that the plaintiff's application for a restraining order be and the same is hereby denied.

It Is Further Ordered that the temporary restraining [fol. 9] order issued by this Court on June 25, 1963, be and the same is hereby vacated for all purposes.

Dated July 26, 1963.

By the Court, Allen Kinney, Judge.

IN THE CIRCUIT COURT FOR DOUGLAS COUNTY, WISCONSIN

ORIGINAL COMPLAINT

Now comes The Hanna Mining Company, National Steel Corporation, The Hansand Steamship Corporation and The Hanna Furnace Corporation, plaintiffs herein, by Johnson, Fritschler, Barstow & Witkin, their attorneys, and for their complaint respectfully state:

I.

Plaintiff The Hanna Mining Company is a corporation organized and existing under the laws of the State of Delaware with a principal office and place of business at 1300 Leader Building, Cleveland 14, Ohio, and it owns and operates vessels on the Great Lakes and tributary waters engaged in the business of transporting cargos in interstate and foreign commerce; The Hanna Mining Company is the authorized and designated vessel operating agent for plaintiff National Steel Corporation, a corporation of the [fol. 10] State of Delaware, The Hansand Steamship Corporation, a corporation of the State of Delaware, and The Hanna Furnace Corporation, a corporation of the State of New York, which also owns vessels on the Great Lakes engaged in the business of transporting cargos in interstate and foreign commerce. The aforesaid vessels are operated

as one integrated fleet by plaintiff The Hanna Mining Company as the vessel operating agent.

The officers and crew members employed on plaintiffs' vessels are assigned interchangeably without regard to the ownership of the vessels by plaintiff The Hanna Mining Company as one of its duties or functions as the designated vessel operating agent. Marine engineers licensed by the United States Coast Guard are employed by plaintiffs on the said vessels to operate and maintain the engines, boilers and other machinery and to direct and supervise the work of unlicensed crew members in the performance of such work in the Engine Department of each vessel.

II.

Defendant District 2, Marine Engineers Beneficial Association is an unincorporated association affiliated with the AFL-CIO and has a principal office and place of busi- [fol. 11] ness at 190 21st Street, Brooklyn 32, New York. The President and Chief Executive Officer of said District 2 is Raymond T. McKay whose office is located at its principal place of business in Brooklyn, New York.

The Secretary-Treasurer and Assistant Business Manager of said District 2 is Melvin H. Pelfrey who maintains an office at 120 Summit Street, Toledo 4, Ohio.

The Vice President and Assistant Business Manager of said District 2 is Charles E. LaPorte who maintains an office at 312 West 2nd Street, Duluth, Minnesota.

Frank Leckie is a representative of the said District 2 employed at 512 West 2nd Street, Duluth 2, Minnesota.

The said District 2 is a labor union with a membership composed of licensed marine engineers and has a number of officers, representatives, employees and places of business in various locations; it now has several representatives, agents and employees engaged in picketing activities at the ore loading docks of the Great Northern Railway Company at Superior, Wisconsin directed against plaintiffs' vessels which use these docks for loading cargos.

[fol. 12]

III.

That effective October 4, 1961, plaintiff The Hanna Mining Company, for itself and as agent on behalf of the other plaintiffs as their vessel operating agent, entered into a labor agreement with defendant District 2, Marine Engineers Beneficial Association, governing the wages, working conditions and terms of employment of licensed marine engineers employed aboard plaintiffs' vessels; that the said labor agreement terminated on July 15, 1962; that during negotiations for a new labor agreement between representatives of plaintiff The Hanna Mining Company and said District 2 in August 1962, a vast majority of the said engineers signed petitions stating that they do not want to be represented for collective bargaining by said District 2 and forwarded such petitions to plaintiff The Hanna Mining Company; that plaintiffs immediately notified said District 2 that said written petitions had been received revoking the authority of said District 2 to act as the collective bargaining agent or union representative for the said engineers; and that any further collective bargaining negotiations should be suspended and held in abeyance until said District 2 established its legal right to represent the said engineers, or a majority of them, preferably by means [fol. 13] of a secret ballot election conducted by an impartial third party which would provide the said engineers an opportunity to vote for or against representation by said District 2.

IV.

That defendant District 2 refused to agree to any election by an impartial third party to resolve the said question of representation and determine its majority status; that defendant District 2 demanded a continuation of collective bargaining negotiations and the execution of a labor agreement binding the said engineers and governing their wages, working conditions and all terms of employment including compulsory union membership notwithstanding the

petitions from the said engineers; that upon the refusal of the plaintiffs to accede to their demands, said District 2 and its officers, agents, employees, members and representatives commenced picketing plaintiffs' vessels on September 12, 1962, in Superior, Wisconsin, and many other Great Lakes Ports with the unlawful objectives of forcing, coercing and compelling plaintiffs to recognize and bargain with the defendants as the union representative of the said engineers and forcing, coercing and compelling the said engineers to join, accept and select the said District 2 as [fol. 14] their collective bargaining representative without any opportunity to determine whether or not defendant labor union represented a majority of the said engineers by means of a properly conducted election; that defendant District 2 and its officers, employees, agents and representatives continued picketing plaintiffs' vessels until December 1962 when Great Lakes navigation ceased for the winter; that such picketing was resumed in the latter part of April 1963 in Superior, Wisconsin at the commencement of navigation with the same unlawful objectives and such picketing is continuing; and that none of the said engineers employed on plaintiffs' vessels have participated in any of these picketing activities and have continued working steadily without any work stoppages of any kind on plaintiffs' vessels.

V.

That plaintiffs filed a petition with the Regional Director of the National Labor Relations Board in Cleveland, Ohio, on September 12, 1962, amended September 17, 1962, Case 8-RM-308, requesting a representation election to determine whether or not defendant labor union represented a majority of the said engineers; that the said Regional Director dismissed the petition on September 25, 1962, upon [fol. 15] a finding that the said engineers were supervisors excluded from the coverage of the National Labor Relations Act and therefore not within the jurisdiction of the said Board; that said ruling of the Regional Director was

affirmed upon appeal by the National Labor Relations Board, Washington, D. C. on a finding that the said engineers were supervisors to whom the National Labor Relations Act does not apply.

VI.

That on September 15, 1962, plaintiffs filed charges against defendant District 2 with the Regional Director of the National Labor Relations Board in Minneapolis, Minnesota, for a possible violation of Section 8 (b) (4) of the National Labor Relations Act for picketing activities creating work stoppages delaying the unloading of cargo from the SS. Joseph H. Thompson, one of Plaintiffs' vessels, at Duluth, Minnesota; that said charges were dismissed on October 22, 1962; and that said dismissal was affirmed upon appeal by the National Labor Relations Board at Washington, D. C. on December 10, 1962.

VII.

That on September 27, 1962, plaintiffs filed a charge against defendant District 2 with the Regional Director of [fol. 16] the National Labor Relations Board in Cleveland, Ohio, for a violation of Section 8 (b) (7) of the National Labor Relations Act for continued picketing of plaintiffs' vessels with the unlawful object of forcing or requiring the plaintiffs to recognize or bargain with defendant District 2 as the representative of said engineers, or forcing or requiring the said engineers to accept or select defendant District 2 as their collective bargaining representative; that said Regional Director dismissed plaintiffs' charges on October 5, 1962; that plaintiffs immediately appealed the said dismissal to the General Counsel of the National Labor Relations Board in Washington, D. C.; that said dismissal was affirmed by the General Counsel by letters dated November 26, 1962 and December 21, 1962, upon the ground that the said engineers are supervisors over whom the said Board has no jurisdiction because the National Labor Relations Act specifically excludes supervisory per-

sonnel from its provisions; and that the administrative dismissal of the plaintiffs' charges was in accordance with the established practice of the said Board.

VIII.

That unless enjoined and restrained from continuing such picketing activities, defendant District 2, Marine En- [fol. 17] gineers Beneficial Association, AFL-CIO, and its officers, agents, members, employees and affiliated labor unions will continue to picket plaintiffs' vessels with the unlawful objectives of coercing, forcing and compelling plaintiffs to recognize and execute a labor contract with the said District 2 as the purported representative of the said engineers and to force the said engineers to accept and select said District 2 as the collective bargaining agent and union representative for said engineers, to cause work stoppages among dock employees, to prevent harbor tugs from rendering towage services, to cause delays in the sailings of plaintiffs' vessels and to cause other economic loss and harm; that plaintiffs have suffered irreparable damage; that plaintiffs have no adequate remedy at law; and that the National Labor Relations Board administering the federal National Labor Relations Act and amendments thereto has declined and refused to take any jurisdiction over this controversy because the said Board has ruled that the licensed marine engineers employed aboard plaintiffs' vessels are supervisors to whom the said Act does not apply.

IX.

That none of the said engineers have participated in any of the picketing activities which have been and are being [fol. 18] conducted by defendants; that the said engineers have remained aboard plaintiffs' vessels performing their regular duties without any work stoppages or interruptions despite the picketing activities conducted by defendants; that no labor dispute exists between the plaintiffs and the said engineers; and that all picketing by

defendants has been conducted by persons who are not employed by the plaintiffs.

Wherefore, the plaintiffs pray for a temporary restraining order, enjoining defendants and each of them, their officers, agents, members, employees, affiliated unions and all other persons or organizations acting in concert or conspiracy with defendants from:

1. Picketing, patrolling or bannering in any way the vessels of the plaintiffs or the docks where said vessels are located, or authorizing, directing, aiding, abetting or otherwise encouraging or participating in such picketing, patrolling or bannering;

2. Seeking to compel plaintiffs to employ only members of defendant labor union, or seeking to compel plaintiffs to coerce their employees to become members of defendant labor union, or to join or maintain membership therein as [fol. 19] a condition of employment aboard plaintiffs' vessels;

3. Attempting in any way to compel persons, partnerships or corporations who either seek to do business or are doing business with or performing services for plaintiff to cease doing its business or performing such services and attempting to compel them or any of them to refuse to enter upon plaintiffs' vessels or docks where such vessels are located;

4. Threatening, intimidating, interfering with or coercing plaintiffs, licensed marine engineers employed by plaintiffs, other employees of the plaintiffs, or any individuals, organizations, corporations, partnerships, by threats of trouble, physical violence, or other discriminatory practices;

5. All other acts or measures seeking to or attempting to carry out any of the foregoing; and that upon final hearing, the said injunction shall be made perpetual and

for such other relief as, in equity, plaintiffs may be found to be entitled, together with recovery of costs herein.

Johnson, Fritschler, Barstow & Witkin, By Barney B. Barstow, 304-308 Telegram Building, Superior, Wisconsin, Attorneys for the Plaintiffs.

[fol. 20] Of Counsel: Montague, Applequist, Lyons, Nolan, Donovan and Knetsch, 1000 Alworth Building, Duluth, Minnesota.

IN THE CIRCUIT COURT FOR DOUGLAS COUNTY, WISCONSIN

ORDER TO SHOW CAUSE—June 25, 1963

On reading and filing the verified complaint herein, and upon the affidavits of Robert J. McDade, S. W. Sexsmith and Howard Andrews, and on motion of Johnson, Fritschler, Barstow & Witkin, attorneys for the plaintiffs.

It Is Ordered that the defendants show cause before me at the Circuit Court Rooms at the Court House in the City of Superior, Douglas County, Wisconsin, on the 1st day of July, 1963, at 10:00 o'clock A. M. of said day, why an injunction should not be granted restraining the defendants, and each of them, as prayed for in the complaint of the plaintiffs.

It Is Further Ordered that until the hearing of said motion and order therein the defendants, and each of them, do absolutely desist and refrain from:

1. Picketing, patrolling or bannering in any way the vessels of the plaintiffs or the docks where said vessels are [fol. 21] located, or authorizing, directing, aiding, abetting or otherwise encouraging or participating in such picketing, patrolling or bannering;

2. Seeking to compel plaintiffs to employ only members of defendant labor union, or seeking to compel plaintiffs to coerce their employees to become members of defendant labor union, or to join or maintain membership therein as a condition of employment aboard plaintiffs' vessels;

3. Attempting in any way to compel persons, partnerships or corporations who either seek to do business or are doing business with or performing services for plaintiffs to cease doing its business or performing such services and attempting to compel them or any of them to refuse to enter upon plaintiffs' vessels or docks where such vessels are located;

4. Threatening, intimidating, interfering with or coercing plaintiffs, licensed marine engineers employed by plaintiffs, other employees of the plaintiffs, or any individuals, organizations, corporations, partnerships, by threats of trouble, physical violence, or other discriminatory practices;

5. All other acts or measures seeking to or attempting [fol. 22] to carry out any of the foregoing.

Let a copy of this order be served on said defendants, and each of them, at least forty-eight (48) hours before the time fixed for hearing the motion as aforesaid, and therewith a copy of the affidavits and the complaint above mentioned.

Dated at Superior, Wisconsin, in said County, this 25th day of June, 1963.

Allen Kinney, Circuit Judge.

IN THE CIRCUIT COURT FOR DOUGLAS COUNTY, WISCONSIN

AFFIDAVIT OF HOWARD F. ANDREWS

Howard F. Andrews, being duly sworn according to law, deposes and says:

I am Manager—Docks and Vessels for The Hanna Mining Company, a Delaware corporation, having a principal office at 1300 Leader Building, Cleveland 14, Ohio. The Hanna Mining Company owns and operates two (2) bulk freight vessels on the Great Lakes in interstate and foreign commerce. It also acts as the operating agent for vessels of National Steel Corporation, Hansand Steam-

ship Corporation and The Hanna Furnace Corporation which it operates on the Great Lakes in the business of [fol. 23] transporting bulk cargos in interstate and foreign commerce.

During negotiations in August 1962 between representatives of The Hanna Mining Company and the Marine Engineers Beneficial Association, District 2, AFL-CIO, a labor union which formerly represented the licensed marine engineers employed on these vessels, a majority of these licensed marine engineers signed petitions in writing which stated that they do not want to be represented by this union and forwarded such petitions to The Hanna Mining Company. Inasmuch as a substantial majority of these employees unequivocally stated that they do not want to be represented by this union at a time when no labor agreement was in effect, The Hanna Mining Company notified the said union that any further contract negotiations should be suspended until the question of representation could be resolved by means of a secret ballot election conducted by an impartial third party. The union refused to agree to such an election and commenced picketing all vessels owned or operated by The Hanna Mining Company on September 12, 1962, with the object of forcing or requiring the company to recognize the union as a collective bargaining agent of these engineers, to negotiate and execute a labor [fol. 24] contract and to compel the company to coerce the licensed marine engineers employed on these vessels to accept the union as their collective bargaining agent.

The picketing of these vessels has been conducted in many of the major ports on the Great Lakes, including Superior, Wisconsin; it continued until the end of the 1962 navigation season in early December. Upon the commencement of Great Lakes navigation in the latter part of April 1963, the Marine Engineers Beneficial Association resumed picketing these vessels with the same objectives. As a consequence of this picketing, towage services have been refused by harbor tugs and work stoppages have occurred among dock workers, thus causing substantial delays and economic losses in the operation of these vessels.

The Union picketed at the ore loading docks of the Great Northern Railway Company in Superior, Wisconsin, during the fall of 1962 and has continued this picketing from the beginning of the 1963 navigation season up to the present time whenever any vessel owned or operated by The Hanna Mining Company has been moored at this dock facility. In addition, the Marine Engineers Beneficial Association picketed the ship yard of the Fraser-Nelson Ship Building [fol. 25] & Dry Dock Company at Superior, Wisconsin, in the latter part of April 1963 when two vessels of this fleet were preparing to depart after the completion of repairs. The vessels involved were the SS. Joseph H. Thompson and the SS. E. T. Weir. The picketing had the effect of causing the officers and crew members of harbor tugs operated in this port by The Great Lakes Towing Company to refuse to tow all such vessels, thus causing considerable delay and endangering the safety of the vessels and the personnel thereon due to adverse weather conditions.

The licensed marine engineers employed on the vessels owned and operated by The Hanna Mining Company against whom the picketing by the Marine Engineers Beneficial Association is directed have not participated in any of the picketing activity; they have all continued working on their respective vessels without any interruptions or work stoppages.

Further, affiant saith not.

IN THE CIRCUIT COURT FOR DOUGLAS COUNTY, WISCONSIN
AFFIDAVIT OF ROBERT J. McDADE

Robert J. McDade, being duly sworn according to law, deposes and says:

I am Director of Industrial Relations for The Hanna [fol. 26] Mining Company, a corporation organized and existing by virtue of the laws of the State of Delaware, and having a principal office at 1300 Leader Building, Cleveland 14, Ohio. The Hanna Mining Company owns and operates two (2) bulk freight vessels on the Great Lakes

engaged in the business of transporting bulk cargos in interstate and foreign commerce. It also acts as the operating agent for seven (7) vessels owned by National Steel Corporation, a Delaware corporation, one (1) vessel owned by Hansand Steamship Corporation, a Delaware corporation, and one (1) vessel owned by The Hanna Furnace Corporation, a New York corporation, which are engaged in the business of transporting bulk cargos on the Great Lakes in interstate and foreign commerce. Marine engineers licensed by the United States Coast Guard are employed in the Engine Department of these vessels in the positions of Chief Engineer, First Assistant Engineer, Second Assistant Engineer and Third Assistant Engineer. A total of five (5) engineer officers are employed on the larger vessels; four (4) are employed on the smaller vessels.

The Chief Engineer employed on each vessel is in charge of the Engine Department; his duties include supervising [fol. 27] and directing the work of all licensed marine engineers and crew members in his department which consist of three (3) or four (4) assistant engineering officers and at least nine (9) unlicensed crew members serving in the positions of Oiler, Fireman and Wiper or Coalpasser. The Engine Department is responsible for the maintenance and operation of the main propulsion machinery, boilers, auxiliaries, electrical equipment and all other machinery aboard each vessel. While the ship is operating, the complement of the Engine Department is divided into three separate watches with an Assistant Engineer in charge of each watch.

The Assistant Engineer in charge of each watch is responsible for the proper operation of all machinery and equipment aboard his vessel while he is on duty. He responsibly directs the work of all unlicensed crew members assigned to his watch. The hours designated for watches are from 12 to 4; 4 to 8; and 8 to 12; hence, each watch is on duty for two four-hour watches, and off duty for two eight-hour periods during a calendar day.

On larger vessels carrying four (4) assistant engineering officers, one assistant engineer is assigned to duty for [fol. 28] eight (8) hours each day for maintaining and repairing machinery and equipment of the Engine Department; he directs the work of unlicensed crew members and subordinate licensed marine engineers during the course of his duties.

The Chief Engineer of each vessel has the authority as the Company's representative to hire, suspend, lay-off, promote, discharge, assign or discipline employees in his department, to responsibly direct their work and adjust their grievances with the exercise of his own independent judgment. In the absence of the Chief Engineer, the First Assistant Engineer of each vessel assumes all of his duties and responsibilities and has the same authority. All licensed marine engineers have the authority to effectively recommend the hiring, suspension, promotion, discharge, assignment or disciplining of unlicensed crew members in the Engine Department and to responsibly direct the work of such crew members. In the course of their duties, assistant engineers are called upon to adjust the grievances of unlicensed employees with the use of their own independent judgment.

Vessels owned by National Steel Corporation, The Hanna Mining Company, The Hansand Steamship Corporation and [fol. 29] The Hanna Furnace Corporation are operated as one integrated fleet by The Hanna Mining Company for itself and as operating agent for National Steel Corporation, Hansand Steamship Corporation and The Hanna Furnace Corporation. Licensed marine engineers are assigned and transferred between vessels of these four companies without regard to ownership. Unlicensed crew members employed on the vessels of these companies are represented for collective bargaining by United Steelworkers of America, Local 7000, AFL-CIO, and they are similarly assigned and transferred between vessels of all four companies without regard to ownership. The appropriate bargaining unit designated by the National Labor Relations Board for un-

licensed seamen includes the vessels of all these companies as a single bargaining unit.

The Marine Engineers Beneficial Association, AFL-CIO, is a labor union with a membership composed of licensed marine engineers and is an unincorporated organization with a principal office in Brooklyn, New York. It has subdivisions known as districts. District 2 of the Marine Engineers Beneficial Association maintains branch offices in several Great Lakes ports where it has officers and representatives, including Duluth, Minnesota; Buffalo, New [fol. 30] York; Chicago, Illinois; and Toledo, Ohio. District 2 presently has collective bargaining agreements in effect with several companies employing licensed marine engineers aboard vessels operating on the Great Lakes and such labor contracts have compulsory union membership provisions requiring licensed marine engineers to join and maintain their membership in the Marine Engineers Beneficial Association as a condition of employment. The compulsory union membership clause in the Labor Contract presently in effect between such companies and District 2, Marine Engineers Beneficial Association, reads, in part, as follows:

"(a) Each present engineer who on October 1, 1961 was a member of the Union in good standing and each engineer who became a member after that date shall, as a condition of employment, maintain his membership in the Union.

"(b) Each engineer hired on or after the the effective date of this agreement, shall, as a condition of employment, commencing on the 30th day following the beginning of such employment or the effective date of this agreement, whichever is later, acquire [fol. 31] and maintain membership in the Union."

In September 1962 the Marine Engineers Beneficial Association, District 2, commenced picketing vessels owned or operated as agent by The Hanna Mining Company for the purpose of requiring the licensed marine engineers em-

ployed on such vessels to designate that organization as their bargaining agent and to compel The Hanna Mining Company to recognize it as the collective bargaining representative for such engineers. The circumstances and factual background of this controversy are hereinafter fully outlined. For convenience and brevity, I shall refer to the Marine Engineers Beneficial Association and its District 2 as the "MEBA"; The Hanna Mining Company will be abbreviated to "Hanna;" National Steel Corporation will be called "National"; The Hansand Steamship Corporation will be referred to as "Hansand"; and The Hanna Furnace Corporation will be referred to as "Furnace."

I.

In May 1961, the MEBA claimed to represent a majority of the licensed marine engineers on Great Lakes vessels owned by Hanna, National and Hansand and demanded to be recognized as the collective bargaining representative [fol. 32] for such engineering officers. In order to resolve the representative status of the MEBA, the parties agreed to have an election conducted by a labor arbitrator named Mr. Mitchell Shipman. At the conclusion of the election, arbitrator Shipman counted the ballots and certified that a majority of the engineers had voted in favor of MEBA representation on July 13, 1961. The MEBA was thereafter recognized by the companies as the collective bargaining agent for all licensed marine engineers employed on Hanna, National and Hansand vessels. Collective bargaining ensued between the parties which culminated in a written labor agreement entered into on October 4, 1961, which expired on July 15, 1962.

II.

Upon the expiration of the previous collective bargaining agreement, Hanna and the MEBA commenced negotiations for a new labor contract in August 1962. While such negotiations were continuing and before a new agreement had been reached, a majority of the licensed marine en-

gineers employed on Hanna, National and Hansand vessels signed petitions in writing which stated that they did not want to be represented by the MEBA and sent them to Hanna. Immediately thereafter, [fol. 33] Hanna notified the MEBA that such petitions had been received bearing the signatures of a substantial majority of the licensed engineers, thus raising a question of representation which should be resolved prior to any further negotiations between the parties upon a new labor contract; that the MEBA could investigate the authenticity of these petitions by consulting with the engineers aboard their respective vessels; and that if investigation by the MEBA failed to confirm their authenticity, Hanna was willing to have the question of authenticity of these petitions submitted to arbitration. However, if no question was raised regarding the authenticity of these petitions, Hanna proposed that another election should be conducted by an impartial labor arbitrator by secret ballot with observers in attendance representing the various parties involved, including the licensed marine engineers, to satisfy everyone that the election was properly conducted. Hanna further advised the MEBA that until its majority representation status was established by means of an election, Hanna could not recognize the MEBA as collective bargaining representative for the licensed marine engineers because of the petitions and was compelled to suspend negotiations [fol. 34] with the MEBA upon the terms and conditions of a new labor agreement pending an election to resolve the question of representation which had arisen.

III.

Representatives of the MEBA boarded the vessels of Hanna, National and Hansand and consulted with the licensed marine engineers in August and September 1962. Thereafter, the MEBA demanded a resumption of contract negotiations without any prior election to resolve the question of representation, notwithstanding the authenticity of the petitions from the engineers involved. Hanna refused to resume contract negotiations until its marine engineers

had an opportunity to vote in a secret ballot election on the selection of the MEBA as their collective bargaining representative. Several meetings were held between Hanna and the MEBA and, on September 11, 1962, the MEBA proposed that a labor contract should be immediately negotiated and signed by the parties and that such labor contract could then be submitted to the marine engineers for ratification by the MEBA without any participation by Hanna or the other companies for which it acts as operating agent or the licensed marine engineers directly involved. Hanna rejected the Union proposal because it did [fol. 35] not provide for a secret ballot election conducted by an impartial labor arbitrator which would assure each engineer an opportunity to make his own individual choice without any coercion or restraint by anyone; Hanna reiterated its proposal of having an election conducted by an impartial arbitrator to determine whether or not the MEBA represented a majority of the engineers.

IV.

On September 12, 1962, the MEBA commenced picketing the SS. Joseph H. Thompson, a vessel owned by Hansand for which Hanna is the operating agent, at the North Western-Hanna Fuel Company dock in Duluth, Minnesota, where its cargo of coal was being unloaded by the dock company. The vessel had arrived during the previous evening and unloading operations had commenced so that a small portion of the Thompson's coal cargo had been removed. The picketing activity was orginally conducted on property of the dock company near the coal dock employees' parking lot by several pickets bearing signs. Later, the pickets moved to the entrance roadway to the dock company premises. The picket signs read as follows:

"HANNA MINING UNFAIR TO
MARINE ENGINEERS BENEFICIAL

[fol. 36] ASSOCIATION
REFUSES TO NEGOTIATE CONTRACT
AFL-CIO
NO DISPUTE WITH ANY OTHER
EMPLOYER
SS. JOSEPH THOMPSON"

V.

The picketing of the SS. Joseph H. Thompson caused the coal dock workers of North Western-Hanna Fuel Company to engage in a concerted refusal to unload the coal cargo from the vessel. The work stoppage continued until September 28, 1962, when the Thompson left this dock without unloading the remainder of her cargo of coal.

The MEBA commenced picketing all vessels owned or operated as agent by Hanna at many of the ports on the Great Lakes including Buffalo, New York; Ashtabula, Ohio; Cleveland, Ohio; Detroit, Michigan; Superior, Wisconsin; and Duluth, Minnesota on September 12, 1962 or soon thereafter. The picketing continued until the close of the Great Lakes season of navigation on or about December 1, 1962 when all vessels were laid up for the winter months and the crews laid off. As a consequence of the picketing, the Hanna, National and Hansand vessels were refused tug [fol. 37] service at many Great Lakes ports; some dock employees of the Great Northern Railway Company at Superior, Wisconsin, refused to load iron ore into such vessels; and the coal dock workers at Duluth, Minnesota persisted in their refusal to unload the coal cargo from the SS. Joseph Thompson. However, none of the licensed marine engineers or unlicensed seamen employed on vessels owned or operated by Hanna participated in any of the MEBA picketing activities and they continued working on their respective vessels until the close of navigation without any work stoppages.

VI.

On September 12, 1962, Hanna filed a petition for a representation election with the Regional Director of the National Labor Relations Board in Cleveland, Ohio, which was designated as Case No. 8-RM-308, requesting the Board to conduct a representation election among the licensed marine engineers on its vessels to determine whether or not the MEBA represented a majority. Upon investigation, the Regional Director dismissed the petition for the stated reason that the licensed marine engineers were supervisors within the meaning of the National Labor Relations Act and therefore not subject to Board jurisdiction. Hanna [fol. 38] promptly appealed the Regional Director's determination to the National Labor Relations Board in Washington, D. C. On November 20, 1962, the Board affirmed the dismissal by the Regional Director upon a finding that a unit of supervisors was involved which is inappropriate under the Act. A copy of this letter is hereto appended as Exhibit "A."

VII.

On September 15, 1962, Hanna filed a charge with the Regional Director of the National Labor Relations Board in Minneapolis, Minnesota, claiming that the MEBA had engaged in illegal secondary boycott activity violating Section 8 (b) (4) of the Act by inducing and encouraging individuals employed by the North Western-Hanna Fuel Company at Duluth, Minnesota, to engage in a boycott of the SS. Joseph H. Thompson. Upon investigation, the Regional Director dismissed the charge on October 22, 1962, whereupon Hanna immediately appealed to the General Counsel of the National Labor Relations Board in Washington. The General Counsel affirmed the Regional Director's dismissal of the charge and his refusal to issue a complaint on December 10, 1962. A copy of the General Counsel's letter affirming the dismissal is hereto appended as Exhibit "B."

[fol. 39] VIII.

On September 27, 1962, Hanna filed a charge against the MEBA with the Regional Director of the National Labor Relations Board in Cleveland, Ohio, claiming that the continued picketing of its vessels with the object of forcing or requiring Hanna to recognize or bargain with the MEBA as the representative of its marine engineers or forcing or requiring marine engineers employed by Hanna to accept or select the MEBA as their collective bargaining representative violated Section 8 (b) (7) of the National Labor Relations Act. The Regional Director assigned Case No. 8 CP-43 to the charge and, upon investigation, dismissed the charge and refused to issue a complaint by letter dated October 5, 1962. A copy of the Regional Director's letter is hereto appended as Exhibit "C".

The Regional Director's dismissal of the charge was immediately appealed to the General Counsel of the National Labor Relations Board in Washington, D. C. The Regional Director's dismissal was affirmed by the General Counsel in a letter dated November 26, 1962, a true copy of which is hereto appended as Exhibit "D."

In response to a request for further clarification, the General Counsel amplified upon the basis for affirming the Re-[fol. 40] gional Director's action in a letter dated December 21, 1962, stating that the disposition of this case was predicated solely upon a finding that the licensed engineers were supervisors who were not covered by Section 8(b)(7) of the Act. Having reached a conclusion which was not dispositive of the charge, the appeal was denied without considering what the posture of the case would have been had the unit personnel been employees within the meaning of the National Labor Relations Act and, in processing the appeal, the General Counsel's office acted in accordance with its established practice. A copy of that letter is hereto appended as Exhibit "E."

IX.

On September 18, 1962, after the commencement of MEBA picketing, Hanna sent the following telegram to the Secretary-Treasurer of the MEBA at Toledo, Ohio:

"To avoid any possible misunderstanding regarding the present situation, the Company advised you on August 22 that a substantial majority of our engineers have signed written petitions stating that they do not want to be represented by the MEBA and sent these petitions to the Company. It is the Company's sincere belief that it cannot in good faith sign a contract recog- [fol. 41] nizing your Union as exclusive collective bargaining agent for our engineers and compelling them to belong to your Union under these circumstances. Therefore, the Company proposed a proper election by secret ballot to determine whether or not your Union represented a majority of our engineers and if any question existed on the part of the MEBA that the petitions from the Engineers were not authentic, then the Company would gladly submit this question to an impartial arbitrator for determination. With our consent and at our invitation you consulted with the engineers aboard our vessels for more than two weeks and thereafter raised no question concerning the authenticity of our engineers' petitions. The Company repeats its previous proposals and is ready to meet with the MEBA at any time to discuss a procedure for having a proper election. Furthermore, the Company is also willing to submit the petitions to an impartial arbitrator and give him authority to determine if the petitions signed by the engineers are authentic and if a majority of our engineers have actually signed such petitions, thus raising a bona fide question concerning the MEBA's right to act as the bargaining agent [fol. 42] for our engineers. Certainly, this procedure is fair to everyone and would avoid possible loss to officers and crew members which can never be replaced. A copy of this message is being sent to all our vessels."

On September 22, 1962, the following reply was received by telegram from the Secretary-Treasurer of the MEBA at Toledo, Ohio:

> "Received telegram from yourself and attorneys also NLRB charges alleging secondary boycott. NLRB petitions, numerous press releases, invitation to Labor Secretary, etc. As to authenticity of petition you are correct. We did not nor do we intend to question it. We are perfectly aware of methods used to obtain it. You are also perfectly aware engineers are supervisory and NLRB charges and petitions are subject to dismissal for lack of jurisdiction and/or merit. I suggest you dismiss attorneys, cease stalling, resume immediate meetings in good faith and work out a solution satisfactory to the engineers. I repeat that we are willing to take any reasonable solution down to the ships for engineers' approval or rejection. In the interval, we will attempt to keep up with and answer your legal gymnastics, one-sided press releases and we are also [fol. 43] inviting Labor Secretary Wirtz to investigate this dispute. Copy to engineers. Melvin Pelfrey, Secretary-Treasurer, District 2, MEBA."

Hanna and the companies for which it acts as operating agents for vessels on the Great Lakes has adopted and continues to maintain the position that the controversy with the MEBA regarding the representation of its licensed marine engineers should be resolved by means of a properly conducted secret ballot election and has so notified the MEBA repeatedly. Notwithstanding Hanna's willingness to resolve the question of representation by means of an election, the MEBA has continued to insist upon the negotiation and execution of a complete collective bargaining agreement extending recognition to the MEBA as collective bargaining agent and containing compulsory Union membership provisions without first establishing its majority status, in support of its demand for a labor contract

notwithstanding its doubtful representative status, the MEBA has intensively picketed all Great Lakes vessels owned and/or operated by Hanna for organizational and recognition objectives. The MEBA picketing has caused coal dock workers, crews of tugs, workers at iron ore load- [fol. 44] ing docks and ship yard employes to refuse to perform services in the course of their employment to Hanna vessels which has caused economic losses of substantial proportions. In published newspaper articles and other communications, the MEBA has stated that this picketing activity will be continued unless Hanna executes a labor contract with the MEBA irrespective of the existence of a question of representation.

XI.

In 1963, the Steamer George B. Fink was sold by National to Furnace prior to the commencement of the Great Lakes navigation season. The said vessel, formerly operated by Hanna for National is now operated by Hanna for Furnace in the same capacity as operating agent as part of the integrated Hanna fleet.

In the latter part of April, 1963, when the Great Lakes navigation season opened, the MEBA resumed picketing all Hanna vessels at Superior, Wisconsin, with signs identical to those used in 1962. On May 10, 1963, the Secretary-Treasurer of the MEBA, District 2, wrote to all Hanna engineers stating that the company must negotiate and execute a labor contract before the MEBA would agree to have any type of election. As a consequence of such picketing, [fol. 45] Hanna vessels have been refused tug service. The Steamer E. T. Weir of National and the Steamer Joseph H. Thompson of Hansand were delayed in departing from the Fraser-Nelson Ship Building & Dry Dock Company shipyard in Superior by adverse weather conditions due to a lack of tugs. Hanna vessels are continually delayed and endangered by the refusal of tug service at the ore loading docks of the Great Northern Railway Company in Superior, Wisconsin.

The continuation of the MEBA picketing to compel the Hanna engineers to belong to the Union regardless of their own desires and to force Hanna (and the companies for which it acts as the operating agent) to deal with the MEBA and to compel its engineers to belong to the Union to keep their jobs without a proper election is causing irreparable injury and is endangering the safety of vessels and their crews due to the lack of tug services in narrow channels and confined waters where navigation is hazardous.

Further, affiant saith not.

[fol. 46]

EXHIBIT "A" TO AFFIDAVIT OF ROBERT J. McDADE

NATIONAL LABOR RELATIONS BOARD

Washington 25, D. C.

November 20, 1962

Re: The Hanna Mining Company
Case No. 8-RM-308

Mr. Robert J. McDade
The Hanna Mining Company
1300 Leader Building
Cleveland 14, Ohio

Dear Mr. McDade:

The Board has considered carefully your Request to Review of the Regional Director's dismissal of the petition in the above case and has concluded that, as the Appellant's appeal makes no affirmative claim that a majority of the "employees" as distinguished from "supervisors" are sought to be represented in an appropriate unit and as a unit of supervisors is otherwise inappropriate, no question concerning representation in an appropriate unit exists. Continental Oil Black Company (Westlake Louisiana

plant), 102 NLRB 870; See Amperex Electronic Corporation, 109 NLRB 353.

Moreover, the apparent request of the Appellant for a declaratory judgment by the Board cannot be considered in an original representation proceeding. The Ohio Con-[fol. 47] solidated Telephone Co., 118 NLRB 375; American Linen Supply Co., 128 NLRB 639. Accordingly, the Regional Director's dismissal of the petition was warranted.

Very truly yours,

GEORGE A. LEET
Associate Executive Secretary

cc: Philip Fusco, Regional Director

Marine Engineers Beneficial Ass'n.,
Dist. 2, AFL-CIO
c/o 120 Summit St., Toledo, Ohio
John Hanninen, Atty., Union Commerce
Bldg., Cleveland 14, Ohio

[fol. 48]

EXHIBIT "B" TO AFFIDAVIT OF ROBERT J. McDADE

NATIONAL LABOR RELATIONS BOARD

Office of the General Counsel
Washington 25, D. C.

December 10, 1962

Re: ILA, Local 1328 and/or Local 1343,
AFL-CIO, Bulk Cargo Dock Workers

(The Hanna Mining Company)
Case No. 18-CC-126
National Marine Engineers
Beneficial Assn. and District 2
Marine Engineers Beneficial Assn.
(The Hanna Mining Co.)
Case No. 18-CC-127

Mr. Robert J. McDade
Director of Industrial Relations
The Hanna Mining Company
1300 Leader Building
Cleveland 14, Ohio

Dear Mr. McDade:

Your appeals from the Regional Director's refusal to issue complaints in the above cases, charging violations under Section 8 of the National Labor Relations Act, have been duly considered.

This Office sustains the ruling of the Regional Director. It was concluded that the evidence was insufficient to establish that either respondent engaged in unlawful secondary [fol. 49] activity, as alleged. In this connection, the evidence revealed that the picketing by MEBA at the common situs herein conformed to Moore Dry Dock standards (92 NLRB 547), notwithstanding that picketing continued after

the vessel was abandoned (cf. Ingram Barge Co., 136 NLRB No. 112), and that oral appeal by MEBA pickets to personnel of the neutral employer were for action solely with respect to the primary situs and did not constitute unlawful activity within the meaning of Section 8 (b)(4) of the Act. Cf. Pure Oil Company, 84 NLRB 315. Furthermore, MEBA's activity at other sites did not evince an unlawful object on the part of the Union inconsistent with the ostensibly primary object of the picketing at the situs of the dispute. Nor did the totality of its conduct establish the unlawfulness of its activity.

As to the walkout by the employees of the Fuel Company, insufficient basis was deemed to exist for a finding that such action was in furtherance of MEBA's dispute with Hanna Mining rather than in protest of an alleged breach of the existing contract between the Fuel Company and the ILA. Accordingly, and absent any other evidence to support the [fol. 50] instant charges, further proceedings herein were deemed unwarranted.

Very truly yours,

Stuart Rothman
General Counsel

By IRVING M. HERMAN
Irving M. Herman
Director, Office of Appeals

cc: Director, 18th Region
John H. Hanninen, Attorney at Law,
860 Union Commerce Building,
Cleveland 14, Ohio

Harry C. Applequist, Attorney at Law,
One Thousand Alworth Bldg.,
Duluth 2, Minnesota

International Longshoreman's Association, AFL-CIO, Local 1328 and/or Local 1343, I. L. A., AFL-CIO, Bulk Cargo Dock Workers, 312 West Second Street, Duluth, Minnesota

Local 1343, I. L. A., AFL-CIO, Bulk Cargo Dock Workers, 4627 W. Sixth Street, Duluth, Minnesota

International Longshoremen's Association, AFL-CIO, 420 Lyceum Bldg., Duluth, Minnesota

National Marine Engineers Beneficial Association, AFL-CIO, and District [fol. 51] 2, Marine Engineers Beneficial Association, AFL-CIO, 312 West Second Street, Duluth, Minnesota, Attn: Mr. Charles LaPorte, Vice President

Mr. Lee Pressman, 50 Broadway, New York, New York

CERTIFIED MAIL

EXHIBIT "C" TO AFFIDAVIT OF ROBERT J. McDADE

NATIONAL LABOR RELATIONS BOARD

EIGHTH REGION
720 Bulkley Building, 1501 Euclid Avenue
Cleveland 15, Ohio

Telephone MAin 1-4465

October 5, 1962

The Hanna Mining Company
1300 Leader Building
Cleveland 14, Ohio

Re: Nat'l Marine Engineers Beneficial Association, AFL-CIO and District 2, Marine Engineers Beneficial Association, AFL-CIO
(The Hanna Mining Company)
Case No. 8 CP-43

Gentlemen:

The above-captioned case charging a violation under [fol. 52] Section 8(b)(7) of the National Labor Relations Act has been carefully investigated and considered.

It does not appear that further proceedings on the charge are warranted inasmuch as there is insufficient evidence that there was picketing of, or a threat to picket, an employer for an object prescribed by Section 8(b) (7) of the Act. I am, therefore, refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board, Washington 25, D. C., and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon

which it is based. The request must be received by the General Counsel in Washington, D. C., by the close of business on October 18, 1962. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request should be submitted to me.

Very truly yours,

PHILIP FUSCO
Philip Fusco
Regional Director

[fol. 53]

cc: Nat'l. Marine Eng. Beneficial Assn., AFL-CIO, 120 Summit, Toledo, Ohio

Dist. 2, Marine Eng. Beneficial Assn., AFL-CIO, 120 Summit, Toledo, Ohio

John H. Hanninen, Attorney, 860 Union Commerce Bldg., Cleveland 14, Ohio

General Counsel, National Labor Relations Board, Washington 25, D. C.

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

EXHIBIT "D" TO AFFIDAVIT OF ROBERT J. McDADE

NATIONAL LABOR RELATIONS BOARD

Office of the General Counsel
Washington 25, D. C.

November 26, 1962

Re: National Marine Engineers Beneficial Association, AFL-CIO and District 2, Marine Engineers Beneficial Assoc., AFL-CIO
(The Hanna Mining Company)
Case No. 8-CP-43

Mr. Robert J. McDade
Director of Industrial Relations
The Hanna Mining Company
1300 Leader Building
Cleveland 14, Ohio

[fol. 54] Dear Mr. McDade:

Your appeal from the Regional Director's refusal to issue complaint in the above case, charging violations under Section 8 of the National Labor Relations Act, has been duly considered.

This office sustains the ruling of the Regional Director. It was concluded that there was insufficient evidence to support a finding that the Unions' picketing of, or the threat to picket, the Employer was for an object prescribed by Section 8 (b)(7) of the Act, particularly in view of the fact that the Union was seeking representation rights in a unit composed solely of supervisors as distinguished from employees within the meaning of the Act. In this connection, it was noted that the Board has sustained the Regional Director's dismissal of the Company's RM petition on the ground that the unit, composed of supervisors, was inappropriate and failed to present a real question concerning

representation. Under all the circumstances therefore, further proceedings herein were deemed unwarranted.

Very truly yours,

Stuart Rothman
General Counsel

[fol. 55] By Irving M. Herman
Irving M. Herman
Director, Office of Appeals

cc: See next page

Certified Mail

Exhibit "E" to Affidavit of Robert J. McDade

NATIONAL LABOR RELATIONS BOARD

Office of the General Counsel
Washington 25, D. C.

December 21, 1962

Re: National Marine Engineers Beneficial Association, AFL-CIO, and District 2, Marine Engineers Beneficial Association, AFL-CIO (The Hanna Mining Co.)
Case No. 8-CP-43

Mr. Robert J. McDade
Director of Industrial Relations
The Hanna Mining Company
1300 Leader Building
Cleveland 14, Ohio

Dear Mr. McDade:

This is in reply to your letter of December 17, concerning the decision by this Office to sustain the Regional Director's refusal to issue complaint in the captioned matter. Our disposition of this case was predicated solely on our con-

[fol. 56] clusion that the supervisory status of the licensed engineers precluded a finding that the Union's picketing and other activity was for an object proscribed by Section 8 (b) (7) of the Act. Moreover, having reached a conclusion which in our view was dispositive of the charge in this matter, the appeal was denied without considering what the posture of the case would have been had the unit personnel been employees within the meaning of Section 2 (3) of the Act. We might add that in processing the appeal in this manner, this Office acted in accordance with its established practice.

Accordingly, we have no alternative but to deny your request for reconsideration and to consider this case closed.

Very truly yours,

STUART ROTHMAN
General Counsel

By IRVING M. HERMAN
Irving M. Herman
Director, Office of Appeals

IN THE CIRCUIT COURT FOR DOUGLAS COUNTY, WISCONSIN

AFFIDAVIT OF STUART W. SEXSMITH

STUART W. SEXSMITH, being duly sworn according to law, deposes and says:

[fol. 57] I am Vessel Manager for The Hanna Mining Company, a corporation organized and existing by virtue of the laws of the State of Delaware and having a principal office at 1300 Leader Building, Cleveland 14, Ohio. The Hanna Mining Company owns and operates two (2) bulk freight vessels on the Great Lakes engaged in the business of transporting bulk cargos in interstate and foreign commerce. It also acts as the operating agent for seven (7)

vessels owned by National Steel Corporation, a Delaware corporation, one (1) vessel owned by Hansand Steamship Corporation, a Delaware corporation, and one (1) vessel owned by The Hanna Furnace Corporation, a New York corporation, which are operated on the Great Lakes in the business of transporting bulk cargos in interstate and foreign commerce.

In May 1961, the Marine Engineers Beneficial Association, District 2, claimed to represent a majority of the licensed marine engineers employed on Great Lakes vessels owned or operated by The Hanna Mining Company and demanded to be recognized as the collective bargaining agent for such engineering officers. The vessels of these companies are operated as one integrated fleet. Engineering officers and other personnel are assigned to vessels operated [fol. 58] by The Hanna Mining Company without regard to ownership and are transferred between vessels of the various companies. Similarly, unlicensed crew members are assigned to such vessels irrespective of ownership and the United Steelworkers of America, Local 7000, AFL-CIO, has been certified as the collective bargaining agent by the National Labor Relations Board for all unlicensed personnel on these vessels in one bargaining unit.

In order to determine the status of the Marine Engineers Beneficial Association as collective bargaining agent for these engineers, the parties mutually agreed to have a representation election conducted by a labor arbitrator. At the conclusion of the election, it was determined that a majority of these engineers had voted in favor of representation by the Union on July 13, 1961. The Marine Engineers Beneficial Association was thereafter recognized as the collective bargaining agent for all licensed marine engineers employed on these vessels. Collective bargaining ensued which culminated in a written labor contract effective October 4, 1961 which expired on July 15, 1962.

Upon the expiration of the previous collective bargaining [fol. 59] agreement, negotiations were commenced for a new labor contract in August 1962. While such negotiations

were continuing prior to any agreement for a new labor contract, a majority of these licensed marine engineers signed petitions in writing which stated that they did not want to be represented by the Marine Engineers Beneficial Association and forwarded them to The Hanna Mining Company. Upon receipt thereof, the Marine Engineers Beneficial Association was notified that such petitions had been received containing the signatures of a substantial majority of these engineers, thus raising a question of representation which should be resolved prior to any further negotiations; that the authenticity of these petitions could be investigated by the Marine Engineers Beneficial Association by consultation with such engineers aboard their respective vessels; and that if the Union's investigation failed to confirm the authenticity of such petitions, any questions concerning their authenticity could be submitted to an arbitrator. On the other hand, if no questions were raised regarding the authenticity of such petitions, another election should be conducted by an impartial labor arbitrator to determine whether or not the Marine Engineers Beneficial Association represented a majority of [fol. 60] these licensed marine engineers. Until this question was resolved, all negotiations on a new collective bargaining agreement should be held in abeyance.

Representatives of the Marine Engineers Beneficial Association conducted an investigation aboard these vessels and consulted with the licensed marine engineers employed thereon during August and September 1962. Without questioning the authenticity of such petitions, the Marine Engineers Beneficial Association nevertheless demanded a resumption of contract negotiations without any prior election to resolve the question of representation. This demand was refused in order to afford these engineers an opportunity to accept or reject the Marine Engineers Beneficial Association as their collective bargaining representative on the basis of a secret ballot election. The Union continued to demand a resumption of negotiations and the execution of a labor contract without an election.

On September 12, 1962, the Union commenced picketing all vessels owned or operated by The Hanna Mining Company in the major ports on the Great Lakes in support of its demand for the negotiation and execution of a labor contract without an election. This picketing activity continued until the end of the 1962 navigation season on [fol. 61] the Great Lakes in the early part of December 1962. Immediately upon the commencement of navigation in the latter part of April 1963, the Marine Engineers Beneficial Association resumed such picketing activities in the port of Superior, Wisconsin, the picket signs reading as follows:

"HANNA MINING UNFAIR TO
MARINE ENGINEERS BENEFICIAL
ASSOCIATION
REFUSES TO NEGOTIATE CONTRACT
AFL-CIO
NO DISPUTE WITH ANY OTHER
EMPLOYER"

The aforementioned picket signs are supplemented with the names of particular vessels against which such picketing activities are directed. The picketing has been conducted at the shipyard of the Fraser-Nelson Ship Building & Dry Dock Company and the ore loading docks of the Great Northern Railway Company in Superior, Wisconsin; it has been carried on whenever any vessel owned or operated by this company is in the port of Superior, Wisconsin. As a consequence, these vessels have been refused towage services by harbor tugs and delays have been caused whenever adverse weather conditions have been encountered. The safety of the vessels and the officers and crew [fol. 62] members employed thereon has been endangered by the lack of towage services because of the necessity for maneuvering in the confined waters in the harbor and to the docks without tug services. The resulting delay to these vessels has caused substantial economic losses.

The Hanna Mining Company is ready and willing to arrange for a secret ballot election by an impartial third party among the licensed marine engineers to determine whether or not a majority of these engineers desire to be represented by the Marine Engineers Beneficial Association and to abide by the result in order to give such engineers a free choice upon the selection of a collective bargaining agent. Nevertheless, the Union has refused to agree to any secret ballot election by an impartial third party and has continued to insist upon the negotiation and execution of a labor contract which would require the company to recognize the Union as the representative of a majority of these engineers and force these engineers to accept the Union as their collective bargaining agent.

Despite the incessant picketing by the Marine Engineers Beneficial Association, the licensed marine engineers employed by The Hanna Mining Company have not partici- [fol. 63] pated in any of the picketing activity and have continued working aboard their respective vessels without any interruptions and work stoppages.

Further affiant saith not.

IN THE CIRCUIT COURT FOR DOUGLAS COUNTY, WISCONSIN

AFFIDAVIT OF RICHARD D. BIBBY

RICHARD D. BIBBY, being first duly sworn on oath, deposes and says that he is a resident of the City of Duluth, St. Louis County, Minnesota, and that he is the Vessel Agent of the Hanna Mining Company; that on or about 5:30 o'clock A. M. June 20, 1963, he personally observed the signs displayed by the pickets at the Great Northern Ore Docks in the City of Superior, Wisconsin, and that at such time he observed that the banner displayed by such pickets bore the following words:

"HANNA MINING COMPANY
ON STRIKE
REFUSES TO NEGOTIATE CONTRACT
DISTRICT 2 MEBA AFL-CIO
SS. ERNEST T. WEIR
NO DISPUTE WITH ANY OTHER
EMPLOYER";

That this affidavit is made for the purpose of supplementing the affidavits and the complaint in that certain action in the Circuit Court for Douglas County, Wisconsin wherein [fol. 64] The Hanna Mining Company, et al, are plaintiffs, and District 2, Marine Engineers Beneficial Association, AFL-CIO, et al, are defendants, and for the purpose of informing the court that the words on the banners displayed by such pickets have been changed since such affidavits and complaint were prepared.

In the Circuit Court for Douglas County, Wisconsin

Defendants' Motion—July 5, 1963

The defendants, appearing specially herein, move the Court to dismiss the Complaint herein on the following grounds:

1. The Court lacks jurisdiction over the subject matter in that the National Labor Relations Board has exclusive jurisdiction of the subject matter herein.

2. The Court has no jurisdiction over the persons of the defendants.

Dated this 5th day of July, 1963.

P. G. McGill, Attorney for Defendants, P. O. Address: 305 Telegram Building, Superior, Wisconsin.

IN THE CIRCUIT COURT FOR DOUGLAS COUNTY, WISCONSIN

AFFIDAVIT OF DAVID SCRIBNER

DAVID SCRIBNER, being duly sworn, deposes and says that [fol. 65] he is a member of the firm of Pressman and Scribner, counsel for defendant, District 2, Marine Engineers Beneficial Association, AFL-CIO, hereinafter called "District 2," and is fully familiar with the facts herein.

On two different occasions the National Labor Relations Board has recently ruled that District 2 is a labor organization within the meaning of the National Labor Relations Act, as amended. In Case No. 6-RC-3291 in the case entitled, the United States Steel Corporation, River Transportation Department, the regional director for the Sixth Region of the National Labor Relations Board, issued a decision and direction of election. In that case District 2 intervened on the basis of a current contract with the employer. The regional director ruled that District 2 was a labor organization within the meaning of Section 2 (5) of the National Labor Relations Act.

Section 2 (5) of that Act provides as follows:

> "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor [fol. 66] disputes, wages, rates of pay, hours of employment, or conditions of work."

Having found in the case that the engineers employed by the United States Steel Corporation on the employer's tow boats operating on the Allegheny and Monongahela Rivers and Ohio River were non-supervisory and employees within the meaning of the Act, the regional director was impelled to find that District 2 which included such employees within its membership was a "labor organization"

as defined above. The National Labor Relations Board denied a review of the regional director's decision, thereby affirming that decision, including the specific ruling that District 2 was a labor organization within the meaning of the Act.

In Case No. 13-CC-320 entitled District 2, Marine Engineers Beneficial Association, AFL-CIO and Chicago and Illinois Midland Railway Company, the railway company had filed a charge with the National Labor Relations Board alleging that District 2 had violated Section 3 (b) (4) of the National Labor Relations Act as amended, by engaging in secondary boycott activity. A basic issue in that case was whether District 2 was a labor organization within the meaning of that Act. If it were to be found that it was not such a "labor organization" the National Labor Relations [fol. 67] Board would have had no jurisdiction to issue any order directed against District 2 or to take any other action with respect to District 2 since a prerequisite of a finding of violation of Section 8 (b) (4) of that Act is that the union charged is a labor organization within the meaning of the Act. After extensive hearings on the very issue of labor organization, the Trial Examiner issued his Intermediate Report holding that District 2 was a labor organization within the meaning of the Act. Again the basis for that holding was that District 2's jurisdiction embraced engineers employed on tow boats on the Mississippi River and its tributaries, and that such engineers were non-supervisory and employees within the meaning of the National Labor Relations Act. And, as in the United States Steel Corporation, supra, it was held that since non-supervisory employees were included within the membership of District 2, that union necessarily was a labor organization within the definition of Section 2 (5) of the Act. The Case No. 13-CC-320 was, after issuance of the Trial Examiner's Intermediate Report, transferred to the National Labor Relations Board. That Board adopted and affirmed the ruling of the Trial Examiner, including the ruling that [fol. 68] District 2 is a labor organization within the meaning of the Act.

Attached hereto and marked Exhibit "A" and made a part hereof for the convenience of the Court, is a copy of the Decision and Direction of Election in the United States Steel Corporation Case No. 6-RC-3291, dated April 29, 1963. Attached hereto and marked Exhibit "B" and made a part hereof, is a copy of the Intermediate Report of the Trial Examiner in Case No. 13-CC-320.

The composition of District 2 as of the present time is the same as it was when the National Labor Relations Board considered and acted upon the two cases referred to above. District 2 continues to include within its membership and to represent a substantial number of engineers employed on the Mississippi River and its tributaries who function in exactly the same manner as did the engineers referred to in the two cases referred to above and who thereby are employees within the meaning of the Act.

IN THE CIRCUIT COURT FOR DOUGLAS COUNTY, WISCONSIN

AMENDED COMPLAINT

Now comes The Hanna Mining Company, National Steel Corporation, The Hansand Steamship Corporation and The Hanna Furnace Corporation, plaintiffs herein, by Johnson, Fritschler, Barstow & Witkin, their attorneys, and for [fol. 69] their amended complaint respectfully state:

I.

Plaintiff The Hanna Mining Company is a corporation organized and existing under the laws of the State of Delaware with a principal office and place of business at 1300 Leader Building, Cleveland 14, Ohio, and it owns and operates vessels on the Great Lakes and tributary waters engaged in the business of transporting cargos in interstate and foreign commerce; The Hanna Mining Company is the authorized and designated vessel operating agent

for plaintiff National Steel Corporation, a corporation of the State of Delaware, The Hansand Steamship Corporation, a corporation of the State of Delaware, and The Hanna Furnace Corporation, a corporation of the State of New York, which also owns vessels on the Great Lakes engaged in the business of transporting cargos in interstate and foreign commerce. The aforesaid vessels are operated as one integrated fleet by plaintiff The Hanna Mining Company as the vessel operating agent.

The officers and crew members employed on plaintiffs' vessels are assigned interchangeably without regard to the ownership of the vessels by plaintiff The Hanna Mining [fol. 70] Company as one of its duties or functions as the designated vessel operating agent. Marine engineers licensed by the United States Coast Guard are employed by plaintiffs on the said vessels to operate and maintain the engines, boilers and other machinery and to direct and supervise the work of unlicensed crew members in the performance of such work in the Engine Department of each vessel.

II.

Defendant District 2, Marine Engineers Beneficial Association is an unincorporated association affiliated with the AFL-CIO and has a principal office and place of business at 190 21st Street, Brooklyn 32, New York. The President and Chief Executive Officer of said District 2 is Raymond T. McKay whose office is located at its principal place of business in Brooklyn, New York.

The Secretary-Treasurer and Assistant Business Manager of said District 2 is Melvin H. Pelfrey who maintains an office at 120 Summit Street, Toledo 4, Ohio.

The Vice President and Assistant Business Manager of said District 2 is Charles E. LaPorte who maintains an office at 312 West 2nd Street, Duluth, Minnesota.

Frank Leckie is a representative of the said District 2 [fol. 71] employed at 312 West 2nd Street, Duluth 2, Minnesota.

The said District 2 is a labor union with a membership composed of licensed marine engineers and has a number of officers, representatives, employees and places of business in various locations; it now has several representatives, agents and employees engaged in picketing activities at the ore loading docks of the Great Northern Railway Company at Superior, Wisconsin directed against plaintiffs' vessels which use these docks for loading cargos.

III.

That effective October 4, 1961, plaintiff The Hanna Mining Company, for itself and as agent on behalf of the other plaintiffs as their vessel operating agent, entered into a labor agreement with defendant District 2, Marine Engineers Beneficial Association, governing the wages, working conditions and terms of employment of licensed marine engineers employed aboard plaintiffs' vessels; that the said labor agreement terminated on July 15, 1962; that during negotiations for a new labor agreement between representatives of plaintiff The Hanna Mining Company and said District 2 in August 1962, a vast majority of the said engineers signed petitions stating that they do not [fol. 72] want to be represented for collective bargaining by said District 2 and forwarded such petitions to plaintiff The Hanna Mining Company; that plaintiffs immediately notified said District 2 that said written petitions had been received revoking the authority of said District 2 to act as the collective bargaining agent or union representative for the said engineers; and that any further collective bargaining negotiations should be suspended and held in abeyance until said District 2 established its legal right to represent the said engineers, or a majority of them, preferably by means of a secret ballot election conducted by an impartial third party which would provide the said engineers an opportunity to vote for or against representation by said District 2.

IV.

That defendant District 2 refused to agree to any election by an impartial third party to resolve the said question of representation and determine its majority status; that defendant District 2 demanded a continuation of collective bargaining negotiations and the execution of a labor agreement binding the said engineers and governing their wages, working conditions and all terms of employment including compulsory union membership notwithstanding [fol. 73] the petitions from the said engineers; that upon the refusal of the plaintiffs to accede to these demands, said District 2 and its officers, agents, employees, members and representatives commenced picketing plaintiffs' vessels on September 12, 1962, in Superior, Wisconsin, and many other Great Lakes ports with the unlawful objectives of forcing, coercing and compelling plaintiffs to recognize and bargain with the defendants as the union representative of the said engineers and forcing, coercing and compelling the said engineers to join, accept and select the said District 2 as their collective bargaining representative without any opportunity to determine whether or not defendant labor union represented a majority of the said engineers by means of a properly conducted election; that defendant District 2 and its officers, employees, agents and representatives continued picketing plaintiffs' vessels until December 1962 when Great Lakes navigation ceased for the winter; that such picketing was resumed in the latter part of April 1963 in Superior, Wisconsin at the commencement of navigation with the same unlawful objectives and such picketing is continuing; and that none of the said engineers employed on plaintiffs' vessels have participated in any of these picketing activities and have continued working steadily [fol. 74] without any work stoppages of any kind on plaintiffs' vessels.

V.

That plaintiffs filed a petition with the Regional Director of the National Labor Relations Board in Cleveland, Ohio,

on September 12, 1962, amended September 17, 1962, Case 8-RM-308, requesting a representation election to determine whether or not defendant labor union represented a majority of the said engineers; that the said Regional Director dismissed the petition on September 25, 1962, upon a finding that the said engineers were supervisors excluded from the coverage of the National Labor Relations Act and therefore not within the jurisdiction of the said Board; that said ruling of the Regional Director was affirmed upon appeal by the National Labor Relations Board, Washington, D. C. on a finding that the said engineers were supervisors to whom the National Labor Relations Act does not apply.

VI.

That on September 15, 1962, plaintiffs filed charges against defendant District 2 with the Regional Director of the National Labor Relations Board in Minneapolis, Minnesota, for a possible violation of Section 8 (b) (4) [fol. 75] of the National Labor Relations Act for picketing activities creating work stoppages delaying the unloading of cargo from the SS. Joseph H. Thompson, one of plaintiffs' vessels, at Duluth, Minnesota; that said charges were dismissed on October 22, 1962; and that said dismissal was affirmed upon appeal by the National Labor Relations Board at Washington, D. C. on December 10, 1962.

VII.

That on September 27, 1962, plaintiffs filed a charge against defendant District 2 with the Regional Director of the National Labor Relations Board in Cleveland, Ohio, for a violation of Section 8 (b) (7) of the National Labor Relations Act for continued picketing of plaintiffs' vessels with the unlawful object of forcing or requiring the plaintiffs to recognize or bargain with defendant District 2 as the representative of said engineers, or forcing or requiring the said engineers to accept or select defendant District 2 as their collective bargaining representative; that said Re-

gional Director dismissed plaintiffs' charges on October 5, 1962; that plaintiffs immediately appealed the said dismissal to the General Counsel of the National Labor Relations Board in Washington, D. C.; that said dismissal was affirmed by the General Counsel by letters dated November [fol. 76] 26, 1962 and December 21, 1962, upon the ground that the said engineers are supervisors over whom the said Board has no jurisdiction because the National Labor Relations Act specifically excludes supervisory personnel from its provisions; and that the administrative dismissal of the plaintiffs' charges was in accordance with the established practice of the said Board.

VIII.

That unless enjoined and restrained from continuing such picketing activities, defendant District 2, Marine Engineers Beneficial Association, AFL-CIO, and its officers, agents, members, employees and affiliated labor unions will continue to picket plaintiffs' vessels with the unlawful objectives of coercing, forcing and compelling plaintiffs to recognize and execute a labor contract with the said District 2 as the purported representative of the said engineers and to force the said engineers to accept and select said District 2 as the collective bargaining agent and union representative for said engineers; that the said picketing has had and will continue to have the harmful effect of causing work stoppages among individuals employed by other employers and of preventing harbor tugs from rendering [fol. 77] towage services, all of which delay and endanger plaintiffs' vessels, thus inflicting economic losses to plaintiffs and causing hazards to such vessels and their crews because dock workers, tug crews and other individuals employed by other employers decline to cross picket lines or are caused to refuse to perform services for plaintiffs as a result of the said picketing; that plaintiffs have suffered irreparable damage; that plaintiffs have no adequate remedy at law; and that the National Labor Relations Board administering the federal National Labor Relations Act

and amendments thereto has declined and refused to take any jurisdiction over this controversy because the said Board has ruled that the licensed marine engineers employed aboard plaintiffs' vessels are supervisors to whom the said Act does not apply.

IX.

That none of the said engineers have participated in any of the picketing activities which have been and are being conducted by defendants; that the said engineers have remained aboard plaintiffs' vessels performing their regular duties without any work stoppages or interruptions despite the picketing activities conducted by defendants; that no labor dispute exists between the plaintiffs and the [fol. 78] said engineers; and that all picketing by defendants has been conducted by persons who are not employed by the plaintiffs.

Wherefore, the plaintiffs pray for a temporary restraining order enjoining defendants and each of them, their officers, agents, members, employees, affiliated unions and all other persons or organizations acting in concert or conspiracy with defendants from:

1. Picketing, patrolling or bannering in any way the vessels of the plaintiffs or the docks where said vessels are located, or authorizing, directing, aiding, abetting or otherwise encouraging or participating in such picketing, patrolling or bannering;

2. Seeking to compel plaintiffs to employ only members of defendant labor union, or seeking to compel plaintiffs to coerce their employees to become members of defendant labor union, or to join or maintain membership therein as a condition of employment aboard plaintiffs' vessels;

3. Threatening, intimidating, interfering with or coercing plaintiffs, licensed marine engineers employed by plaintiffs, other employees of the plaintiffs, or any individuals, organizations, corporations, partnerships, by threats of

[fol. 79] trouble, physical violence, or other discriminatory practices;

4. All other acts or measures seeking to or attempting to carry out any of the foregoing; and that upon final hearing, the said injunction shall be made perpetual and for such other relief as, in equity, plaintiffs may be found to be entitled, together with recovery of costs herein.

Johnson, Fritschler, Barstow & Witkin, By Barney B. Barstow, 304-308 Telegram Building, Superior, Wisconsin, Attorneys for the Plaintiffs.

Of Counsel:

Montague, Applequist, Lyons, Nolan, Donovan and Knetsch, 1000 Alworth Building, Duluth, Minnesota;

McCreary, Hinslea & Ray, 860 Union Commerce Building, Cleveland, Ohio.

IN THE CIRCUIT COURT FOR DOUGLAS COUNTY, WISCONSIN

Exhibits

EXCERPT FROM CHARGE FILED BY THE HANNA MINING COMPANY WITH NATIONAL LABOR RELATIONS BOARD DATED SEPTEMBER 15, 1962.

The above named labor organizations and their agents [fol. 80] and representatives on or about September 12, 1962, and thereafter, induced and encouraged employees and individuals employed by the North Western-Hanna Fuel Company at Duluth, Minnesota, to engage in a strike or a concerted refusal in the course of their employment to unload vessels operated by The Hanna Mining Company, for itself and as agent for the owners of such vessels, or to perform any services with respect to said vessels, with the object of forcing or requiring North Western-Hanna Fuel Company to cease doing business with The Hanna Mining Company and/or for the purpose of forcing or requiring The Hanna Mining Company to recognize or bargain with said labor organizations as the representative of

its employees, although such labor organizations have not been certified as the representative of such employees under the provisions of Section 9 of the Act.

EXCERPT FROM CHARGE FILED BY THE HANNA MINING COMPANY WITH NATIONAL LABOR RELATIONS BOARD DATED SEPTEMBER 27, 1962.

The above named labor organizations and/or their agents or representatives on or about September 12, 1962, and continuing thereafter, have picketed or caused to be picketed, and threatened to picket or cause to be picketed, [fol. 81] vessels operated by The Hannan Mining Company for itself and as agent for the owners of such vessels with the object of forcing or requiring The Hanna Mining Company to recognize or bargain with District 2, Marine Engineers Beneficial Association, AFL-CIO, a labor organization, as the representative of its employees or forcing or requiring the employees of The Hanna Mining Company to accept or select said District 2, Marine Engineers Beneficial Association, AFL-CIO, as their collective bargaining representative although said District 2, Marine Engineers Beneficial Association, AFL-CIO, has not been certified as the representative of such employees under the provisions of Section 9 of the Act and has not filed a petition under Section 9 (c) of the Act. By these and other actions the aforesaid labor organizations or either of them have committed unfair labor practices under the National Labor Relations Act.

BRIEF SUBMITTED IN BEHALF OF NATIONAL MARINE ENGINEERS BENEFICIAL ASSOCIATION AND DISTRICT 2, MEBA TO GENERAL COUNSEL, NATIONAL LABOR RELATONS BOARD.

In opposition to Request for Review by the General Counsel of Refusal to Issue Complaint and Dismissal of Charge by the Regional Director, Eighth Region, on behalf of The Hanna Mining Company.

[fol. 82] On behalf of the National MEBA and District 2, MEBA, we respectfully request that the Request for Re-

view by the General Counsel filed in the above matter be dismissed.

(1) On September 5, 1962, the Hanna Mining Company filed charges against the National MEBA and District 2, MEBA, alleging violations of Section 8 (b) (i) (ii) (A) and (B) of the Act. (Case No. 18-CC-127)

These charges are presently under consideration by the Regional Director of the Eighteenth Region of the Board.

(2) On September 12, 1962, The Hanna Mining Company filed in the Eighth Region of the Board a petition for an investigation and certification for representatives under Section 9 (c) of the National Labor Relations Act with respect to the licensed marine engineers employed by the Company on its Great Lakes vessels. (Case No. 8-RM-308)

This petition was dismissed on September 25, 1962 by the Regional Director on the specific ground that the workers in the proposed unit are not "employees" within the meaning of Section 2 (3) of the Act, being employed as "supervisors" as defined in Section 2 (11) of the Act.

[fol. 83] The Company took an appeal from such decision. On behalf of the National MEBA and District 2, MEBA, there has been filed with the Board a letter in opposition. This appeal is still pending.

(3) On September 27, 1962, The Hanna Mining Company on the basis of the same set of facts involved in the above noted Case No. 18-CC-127, namely, an alleged claim for representation by MEBA in behalf of the licensed marine engineers employed by Hanna Mining Company, filed another charge against the National MEBA and District 2, MEBA, alleging a violation of Section 8 (b) (7) of the Act. (Case No. 8-CP-43). These charges were filed in the Eighth Regional office of the Board.

On October 5, 1962, the Regional Director dismissed the charges.

The Request for Review presented herein to the General Counsel reflects a complete misunderstanding of the decisions which have been made by the Board and Regional

Directors with respect to two separate and distinct issues: First, whether "employees" are involved where such factor is decisive and Second, whether a labor organization is involved in the case of alleged violation of Section 8 (b) (4) of the Act. The opinion of the U. S. Supreme Court in [fol. 84] MEBA v. Interlake Steamship Co., 370 U. S. 173 does not conflict with such previous decisions of the Board.

As long as the Board's determination in Globe Steamship Company, 85 NLRB 475, remains unreversed, licensed marine engineers, as those employed by Hanna Mining and represented by MEBA, are deemed to be "supervisors" and not "employees" as these terms are defined in the Act.

Accordingly, the Regional Director was correct in dismissing the Petition for an election in Case No. 8-RM-308, since only "supervisors" were involved.

Similarly, the Regional Director was correct in dismissing the charge involved in the instant appeal which alleges a violation of Section 8 (b) (7) since only "supervisors" were involved. For this provision of the Act to be applicable, the labor organization must be purporting to represent "employees" of the employer. This factor being absent, the charge had to be dismissed.

Incidentally, if the Board will decide that under Section 8 (b) (7), petitions for elections among licensed marine engineers, though "supervisors," will be entertained and processed, the MEBA will be deeply appreciative and will [fol. 85] immediately utilize such machinery.

It is under Section 8 (b) (4) of the Act, where certain prohibitions have been imposed upon "labor organizations," that the Board has held, regardless of the character of the primary workers involved in the immediate dispute, if the activities of the labor organization fall within the prescribed area involving secondary employees, such Section is applicable. And the Board has held that a union is a labor organization where it has at least 2 or more members who are "employees" tho not necessarily involved in the immediate dispute. See MEBA v. NLRB, 274 F2d 167.

This is the situation under consideration by the Regional Director in Case 18-CC-127.

In the case of MEBA v. Interlake Steamship Company case, supra, the Supreme Court merely affirmed its preemption doctrine, since the complaint embraced a possible violation of Section 8 (b) (4) of the Labor Act and reversed the State Court's assumption of jurisdiction.

The Request for Review should therefore be dismissed.

Respectfully submitted,

LEE PRESSMAN
Lee Pressman
Attorney for National MEBA and
District 2, MEBA, (AFL-CIO)
50 Broadway
New York City, N. Y.

[fol. 86]

NATIONAL LABOR RELATIONS BOARD
EIGHTH REGION
720 Bulkley Building,
1501 Euclid Avenue
Cleveland 15, Ohio

Telephone MAin 1-4465
September 25, 1962

The Hanna Mining Company
1300 Leader Building
Cleveland 14, Ohio

Re: The Hanna Mining Company
Case No. 8-RM-308

Gentlemen:

The above-captioned case, petitioning for an investigation and certification of representatives under Section 9 (c) of the National Labor Relations Act, has been carefully investigated and considered.

As a result of the investigation, it appears that, because the employees in the proposed unit are not employees within the meaning of Section 2 (3) of the Act, being employed as supervisors as defined in Section 2 (11) of the Act, further proceedings are not warranted at this time. I am, therefore, dismissing the petition in this matter.

[fol. 87] Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing a request for such a review with the National Labor Relations Board, Washington, 25, D. C. A copy of such request for review must be served upon each of the other parties to the proceeding, including the undersigned. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request (original and six copies) should be filed within ten (10) days from the date of receipt of this letter, except that the Board may, upon good cause shown, grant special permission for a longer period within which to file.

Very truly yours,

PHILIP FUSCO
Regional Director

cc: National Labor Relations Board,
Washington 25, D. C.
Marine Engineers Beneficial Ass'n.,
Dist. 2, AFL-CIO,
c/o 120 Summit St., Toledo, O.

John Hanninen, Atty.,
Union Commerce Bldg.,
Cleveland 14, O.

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[fol. 88]

NATIONAL LABOR RELATIONS BOARD
EIGHTEENTH REGION
316 Federal Building,
110 South Fourth Street
Minneapolis 1, Minnesota

Telephone 339-0112
October 16, 1962

The Hanna Mining Company
1300 Leader Building
Cleveland 14, Ohio

Attention: Mr. R. J. McDade
Director of Industrial Relations

Re: National Marine Engineers Beneficial Association, AFL-CIO, and District 2 Marine Engineers Beneficial Association, AFL-CIO (The Hanna Mining Company)
Case No. 18-CC-127

Gentlemen:

The charge which you filed in this matter has been investigated and the results carefully considered. As a consequence, it is our conclusion that no violation of Section 8 (b) (4) (i) (ii) (A) or (B) of the Act is indicated.

[fol. 89] In the first place, allegation of violation of 8 (b) (4) (i) (ii) (A) was undoubtedly inadvertent. As to 8 (b) (4) (i) (ii) (B), the investigation indicates that the picketing conforms to the criteria set forth in the Moore Dry Dock decision, and further that the inducement of the employees of secondary employers was limited to inducing them to cease performing services aboard the ship. We can not regard the removal of the employees from the ship since it remained the situs of the dispute.

We must therefore request that the charge be withdrawn and for this purpose the appropriate forms are enclosed. In the event that the withdrawal is not received by October 24, it will be necessary to dismiss the charge.

Very truly yours,

CLARENCE A. METER
Clarence A. Meter
Regional Attorney

Enclosures

cc: John H. Hanninen, Attorney
860 Union Commerce Bldg.
Cleveland 14, Ohio

Harry C. Applequist, Attorney
One Thousand Alworth Bldg.
Duluth 2, Minnesota

[fol. 90]

NATIONAL LABOR RELATIONS BOARD

EIGHTEENTH REGION
316 Federal Building,
110 South Fourth Street
Minneapolis 1, Minnesota

Telephone 339-0112
October 22, 1962

The Hanna Mining Company
1300 Leader Building
Cleveland 14, Ohio

Attention: Mr. Robert J. McDade
Director of Industrial Relations

Re: International Longshoremen's Association, AFL-CIO, Local 1328, and/or Local 1343, I. L. A., AFL-CIO, Bulk Cargo Dock Workers (The Hanna Mining Company)

Case No. 18-CC-126

Gentlemen:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears for reasons expressed in Attorney Meter's letter of October 16, 1962, [fol. 91] further proceedings are not warranted at this time. I am, therefore, refusing to issue complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations (Section 102.19), you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board, Washington 25, D. C., and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request must be received by the General Counsel in Washington, D. C., by the close of business on November 5, 1962. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request should be submitted to me.

Very truly yours,

C. Edward Knapp
C. Edward Knapp
Regional Director

Certified
R/R/R

Cc: See page 2

[fol. 92]
NATIONAL LABOR RELATIONS BOARD

EIGHTEENTH REGION
316 Federal Building,
110 South Fourth Street
Minneapolis 1, Minnesota

Telephone 339-0112

October 22, 1962

The Hanna Mining Company
1300 Leader Building
Cleveland 14, Ohio

Attention: Mr. R. J. McDade,
Dir. of Indus. Rel.

Re: National Marine Engineers Beneficial Association, AFL-CIO, and District 2, Marine Engineers Beneficial Association, AFL-CIO (The Hanna Mining Company)

Case No. 18-CC-127

Gentlemen:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears for reasons [fol. 93] expressed in Attorney Meter's letter of October 16, 1962, further proceedings are not warranted at this time. I am, therefore, refusing to issue complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations (Section 102.19), you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board, Washington 25, D. C., and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request must be

received by the General Counsel in Washington, D. C., by the close of business on November 5, 1962. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request should be submitted to me.

Very truly yours,

C. EDWARD KNAPP
C. Edward Knapp
Regional Director

See page 2 for cc:

Certified, R/R/R

[fol. 94]
NATIONAL LABOR RELATIONS BOARD

EIGHTEENTH REGION
316 Federal Building,
110 South Fourth Street
Minneapolis 1, Minnesota

Telephone 339-0112

October 16, 1962

The Hanna Mining Company
1300 Leader Building
Cleveland 14, Ohio

Attention: Mr. R. J. McDade
Director of Industrial Relations

Re: International Longshoremen's Association, AFL-CIO, Local 1328, and/or Local 1343, I. L. A., AFL-CIO, Bulk Cargo Dock Workers
(The Hanna Mining Company)

Case No. 18-CC-126

Gentlemen:

We have completed our investigation of this charge and regret to advise you that our conclusion is that no violation of Section 8 (b) (4) (i) (ii) (A) or (B) has occurred.

[fol. 95] As you realize, the charge, through inadvertence, alleged a violation of 8 (b) (4) (i) (ii) (A). With respect to the violation of 8 (b) (4) (i) (ii) (B), the evidence as to the conduct and actions of representatives of the charged union indicates that there were merely requests to honor the primary picket line of another labor organization, which requests were of the nature which the Board and the Courts have found privileged in such cases as Milwaukee Plywood Company, 126 NLRB affd. 285 F. 2d 325 (C. A. 7).

We must therefore request that the charge be withdrawn and for this purpose the appropriate forms are enclosed. In the event that the withdrawal is not received by October 24, it will be necessary to dismiss the charge.

Very truly yours,

CLARENCE A. METER
Clarence A. Meter
Regional Attorney

Enclosures

cc: John H. Hanninen, Attorney
860 Union Commerce Bldg.
Cleveland 14, Ohio

Harry C. Applequist, Attorney
One Thousand Alworth Bldg.
Duluth 2, Minnesota

[fol. 104]

IN THE SUPREME COURT OF WISCONSIN

THE HANNA MINING COMPANY, NATIONAL STEEL CORPORATION, HANSAND STEAMSHIP CORPORATION and THE HANNA FURNACE CORPORATION, Appellants,

v.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, Respondents.

JUDGMENT—April 13, 1964

This cause came on to be heard on appeal from the order of the Circuit Court for Douglas County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the Circuit Court for Douglas County, in this cause, be, and the same is hereby affirmed with costs against the said appellants.

Chief Justice Currie took no part.

[fol. 105] [File endorsement omitted]

Notice

This opinion is subject to further editing and modification. The official version will appear in the bound volume of the Wisconsin Reports.

In the Supreme Court of Wisconsin

No. 169

August Term, 1963

The Hanna Mining Co., et al., Appellants,

v.

District 2, Marine Engineers Beneficial Association, AFL-CIO, Respondent.

Appeal from an order of the circuit court for Douglas county: Allen Kinney, Circuit Judge. Affirmed.

Opinion—April 13, 1964

Action by The Hanna Mining Company, National Steel Corporation, Hansand Steamship Corporation and The Hanna Furnace Corporation, against District 2, Marine Engineers Beneficial Association, AFL-CIO (hereinafter called MEBA), and several of its officers, to enjoin defendants, agents, officers and members of MEBA, and others acting in concert with them from picketing plaintiffs' vessels and the docks where they are located.

The action was commenced June 25, 1963, by service of a summons, complaint, order to show cause and restraining order, and supporting affidavits. Defendants appeared specially and moved for dismissal on the ground (not in-[fol. 106] volved on this appeal) of lack of jurisdiction over the persons of defendants and on the ground that "The

Court lacks jurisdiction over the subject matter in that the National Labor Relations Board has exclusive jurisdiction of the subject matter herein." Affidavits supporting the motion were also filed. On July 15, 1963, after hearing on the motion, but before decision thereof, an amended complaint was served.

On July 26, 1963, the circuit court entered an order dismissing the complaint on the ground of lack of jurisdiction because the matter is within the jurisdiction of the NLRB, and vacating the restraining order. Plaintiffs appealed. Various proceedings were later had, not directly involved on this appeal, under which the restraining order was continued in effect pending the appeal, but was vacated October 30, 1963, upon posting of bond by defendants.

The following facts appear, in substance, from the amended complaint and affidavits on file:

Plaintiff corporations own and operate vessels on the Great Lakes transporting cargoes in interstate and foreign commerce. One of the plaintiffs, The Hanna Mining Company, acts as the operating agent for all of the plaintiffs' vessels, which are operated as one integrated fleet. The defendant association (MEBA) is a labor organization with a membership composed of licensed marine engineers.

Effective October 4, 1961, Hanna Mining entered into a labor agreement with MEBA governing the terms of employment of licensed marine engineers employed aboard plaintiffs' vessels, and this agreement terminated July 15, [fol. 107] 1962. During subsequent negotiations a majority of such engineers notified Hanna Mining that they did not want to be represented by MEBA and Hanna Mining took the position that further negotiations with MEBA must be suspended until a majority voted for MEBA in a secret ballot election.

Plaintiffs alleged in the amended complaint that on September 12, 1962, MEBA commenced picketing plaintiffs' vessels in Superior, Wisconsin, and other ports "with the unlawful objectives of forcing, coercing and compelling plaintiffs to recognize and bargain with [MEBA] as the union representative of the said engineers and forcing,

coercing and compelling the said engineers to join, accept and select [MEBA] as their collective bargaining representative without any opportunity to determine whether or not [MEBA] represented a majority of the said engineers by means of a properly conducted election. . . ." They alleged that the picketing continued until the close of the 1962 navigation season, and was resumed at the commencement of navigation in April, 1963.

Plaintiffs also alleged in the amended complaint "that the said picketing has had and will continue to have the harmful effect of causing work stoppages among individuals employed by other employers and of preventing harbor tugs from rendering towage services, all of which delay and endanger plaintiffs' vessels, thus inflicting economic losses to plaintiffs and causing hazards to such vessels and their crews because dock workers, tug crews and other individuals employed by other employers decline to cross picket lines or are caused to refuse to perform services for plaintiffs as a result of the said picketing. . . ."

On September 12, 1962, Hanna Mining filed a petition with the regional director of NLRB at Cleveland, Ohio, requesting a representation election with respect to its marine engineers. The regional director dismissed the petition, stating that: "As a result of the investigation, it appears that, because the employees in the proposed unit are not employees within the meaning of Section 2(3) of the Act, being employed as supervisors as defined in Section 2(11) of the Act, further proceedings are not warranted at this time."

[fol. 108] Upon request for review, the NLRB "concluded that, as the Appellant's appeal makes no affirmative claim that a majority of the 'employees' as distinguished from 'supervisors' are sought to be represented in an appropriate unit and as a unit of supervisors is otherwise inappropriate, no question concerning representation in an appropriate unit exists . . .

"Moreover, the apparent request of the Appellant for a declaratory judgment by the Board cannot be considered

in an original representation proceeding . . . Accordingly, the Regional Director's dismissal of the petition was warranted."

On September 15, 1962, Hanna Mining filed a charge with the regional director of NLRB at Minneapolis, Minnesota, claiming that MEBA had engaged in illegal secondary boycott activity which would be an unfair labor practice under sec. 8(b)(4) of NLRA by inducing and encouraging individuals employed by the North Western Hanna Fuel Company at Duluth, to engage in a boycott of one of these vessels. The regional director refused to issue a complaint, stating that investigation indicated that the inducement of the employees of secondary employers was limited to inducing them to cease performing services aboard the ship.

Upon appeal, the general counsel of NLRB sustained the regional director's ruling, saying:

". . . It was concluded that the evidence was insufficient to establish that either respondent engaged in unlawful secondary activity, as alleged. In this connection, the evidence revealed that the picketing by MEBA at the common situs herein conformed to *Moore Dry Dock* standards (92 NLRB 547), notwithstanding that picketing continued after the vessel was abandoned (cf. *Ingram Barge Co.*, 136 NLRB No. 112), and that oral appeal by MEBA pickets to personnel of the neutral employer were for action solely with respect to the primary situs and did not constitute unlawful activity within the meaning of Section 8(b)(4) of the Act. Cf. *Pure Oil Company*, 84 NLRB 315. Furthermore, MEBA's activity at other sites did not evince an unlawful object on the part of the Union inconsistent with the ostensibly primary object of the picketing at the situs of the dispute. Nor did the totality of its conduct establish the unlawfulness of its activity."

[fol. 109] On September 27, 1962, Hanna Mining filed a charge with the regional director of NLRB at Cleveland, Ohio, claiming that MEBA had engaged in an unfair labor practice under sec. 8(b)(7) of NLRA by picketing the ves-

sels with the unlawful object of forcing plaintiffs to bargain with MEBA or forcing the engineers to accept MEBA as their representative. The regional director refused to issue a complaint because "there is insufficient evidence that there was picketing of, or a threat to picket, an employer for an object proscribed by Section 8(b)(7) of the Act . . ."

Upon appeal, the general counsel sustained the ruling of the regional director, and explained: "Our disposition of this case was predicated solely on our conclusion that the supervisory status of the licensed engineers precluded a finding that the Union's picketing and other activity was for an object proscribed by Section 8(b)(7) of the Act . . ."

Counsel for MEBA filed an affidavit establishing that NLRB has ruled in other cases that MEBA is a labor organization within the meaning of NLRA because some of its members are not supervisors and are employees within the meaning of NLRA.

No claim is made that the picketing involved or threatened violence.

[fol. 110] FAIRCHILD, J. The gist of plaintiffs' claim, upon the merits, appears to be that MEBA's picketing, although non-violent, is for an unlawful purpose, and plaintiffs are therefore entitled to an injunction. Allegedly, MEBA is attempting to coerce plaintiffs to bargain with MEBA as the representative of the marine engineers, against the wishes of a majority of the latter. The picketing is allegedly intended to induce others to refuse to perform essential services for plaintiffs' vessels, in order to present plaintiffs with the choice between suffering substantial loss and unlawfully bargaining with MEBA. Under a similar theory, this court affirmed an injunction against otherwise peaceful picketing in *Vogt, Inc.* v. *International Brotherhood.*[1]

---

[1] (1956), 270 Wis. 315, 71 N. W. (2d) 359, affirmed in *Teamsters Union* v. *Vogt, Inc.* (1957), 354 U. S. 284, 77 Sup. Ct. 1166, 1 L. Ed. (2d) 1347.

Because of the nature of plaintiffs' business, the effect of disruptions therein upon interstate and foreign commerce is obvious. Plaintiffs are employers within the meaning of NLRA,[2] and their nonsupervisory personnel are employees within its meaning. MEBA on the other hand has been held by NLRB to be a labor organization within the meaning of NLRA because some of the members of MEBA are employees as defined in NLRA.[3] Thus the question immediately arises whether a state court has any jurisdiction to deal with the merits of the matter.

The general rule (in the absence of mass picketing, violence, or overt threats of violence[4]) and some of the considerations upon which the rule is based, have been laid down by the supreme court of the United States in *San* [fol. 111] *Diego Unions* v. *Garmon*[5] as follows:

"At times it has not been clear whether the particular activity regulated by the States was governed by sec. 7 or sec. 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board.

"...

"To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board

---

[2] 29 USCA sec. 141 ff.

[3] See *Marine Engineers* v. *Interlake Co.* (1962), 370 U. S. 173, 82 Sup. Ct. 1237, 8 L. Ed. (2d) 418.

[4] *Auto Workers* v. *Wisconsin Board* (1956), 351 U. S. 266, 76 Sup. Ct. 794, 100 L. Ed. 1162; *Youngdahl* v. *Rainfair, Inc.* (1957), 355 U. S. 131, 78 Sup. Ct. 206, 2 L. Ed. (2d) 151.

[5] (1959), 359 U. S. 236, 244, 245, 246, 79 Sup. Ct. 773, 3 L. Ed. (2d) 775.

decides, subject to appropriate federal judicial review, that conduct is protected by sec. 7, or prohibited by sec. 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. The withdrawal of this narrow area from possible state activity follows from our decisions in *Weber* and *Guss*. The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."

In later cases, the supreme court of the United States has held that state courts have no power to enjoin activity which is an arguable violation of sec. 8 (b) of the NLRA,[6] or is arguably protected by the NLRA.[7]

---

[6] *Construction Laborers* v. *Curry* (1963), 371 U. S. 542, 546, 83 Sup. Ct. 531, 9 L. Ed. (2d) 514.

[7] *Liner* v. *Jafco, Inc.* (1964), 375 U. S. 301, 84 Sup. Ct. , 11 L. Ed. (2d) 347. See *Local 248, U. A., A. & A. I. W.* v. *Wisconsin*

[fol. 112] The *Garmon* rule has been recently applied by the supreme court of the United States to the question of whether an organization (MEBA, as it happens) is a labor organization under NLRA. Where MEBA's conduct was of a kind arguably prohibited by NLRA if MEBA were a labor organization under NLRA, a state court must decline to assert jurisdiction over the activity as soon as the evidence before it is sufficient to show that MEBA is "arguably a 'labor organization.'"[8]

Picketing of a type commonly referred to as recognition picketing is made an unfair labor practice by sec. 8 (b)(7) of NLRA, but such is not an unfair labor practice in the present case if the objects of the picketing, *viz*: the plaintiffs' marine engineers, are deemed supervisory personnel and thus are not employees within the meaning of NLRA. Sec. 8 (b)(4), however, prohibits secondary boycotting which occurs when a union directs pressure, whether by strike or otherwise, against an employer or other person with whom it has no dispute or grievance, for the purpose of persuading or coercing that neutral person to stop dealing with a primary party with whom the union has a dispute, as a means of exerting pressure on the primary party.[9] Sec. 8 (b)(4) of the NLRA provides as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

[fol. 113] "(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or

---

E. R. Board (1960), 11 Wis. (2d) 277, 105 N. W. (2d) 271, certiorari denied (1961), 365 U. S. 878, 81 Sup. Ct. 1028, 6 L. Ed. (2d) 190, and *Markham* v. *American Motors Corp.* (1964), 22 Wis. (2d) 680, 685, 126 N. W. (2d) 753, at 755.

[8] *Marine Engineers* v. *Interlake Co., supra,* p. 177, footnote 3.

[9] See CCH, Labor Law Reporter, para. 5220, p. 10,534 ff.

work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"...

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in the clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

"..."[10]

As seen from the foregoing there is or may be a common denominator between recognition picketing and secondary boycotting. In both coercion may be accompanied through the effect of the activity upon neutral third parties. Plaintiffs' claim that MEBA, considered as a labor organization, is coercing plaintiffs by inducing work stoppages among dock workers and tug crews, employed by others, arguably charges an unfair labor practice under sec. 8(b)(4)(B) of NLRA, relating to so-called secondary boycott. If the activity does not constitute a secondary boycott, the reason would seem to be that the activity was no more than "primary picketing," and apparently the regional director and general counsel were unconvinced that the activity went beyond primary picketing. It would seem to us, in [fol. 114] contemplation of the *Garmon* rule as stated by the supreme court, that the drawing of the distinction between a secondary boycott and primary picketing should

[10] 29 USCA, p. 54, sec. 158.

surely be performed by the NLRB. It may well be of significance also, that the activity considered by the general counsel took place in Duluth, Minnesota, in 1962, and the conduct which is made the basis for injunction occurred in Superior, Wisconsin, at later dates, and must at least differ in detail, if not in relevant substance.

If the picketing were deemed no more than primary, and if the marine engineers whom MEBA is seeking to represent were non-supervisory, plaintiffs' claim arguably charges an unfair labor practice under sec. 8(b)(7) of NLRA making it an unfair labor practice for a labor organization to picket an employer in order to force him to recognize it as the representative of employees for whom it has not been properly certified. Plaintiffs do not appear to claim that it is not arguable that the marine engineers are employees under the Act. Indeed they filed a charge on the basis (presumably) that they were employees, and are asking the state courts to proceed upon the general counsel's refusal to file a complaint.

Plaintiffs acknowledge the *Garmon* rule to the extent that a state agency or court has no jurisdiction over conduct arguably subject to NLRA until the NLRB has made a final determination that the conduct is not so subject. They stress the references in *Garmon* to the "exclusive primary competence" and "primary jurisdiction" [fol. 115] of the NLRB and the statement that the determination must be "left in the first instance" to NLRB, and to the statement in *Marine Engineers* v. *Interlake Co., supra* (p. 185), that "While the Board's decision is not the last word, it must assuredly be the first." They argue that the rules of the general counsel are determinations of the NLRB. Thus they assert that they have fulfilled the *Garmon* rule for avoidance of conflict between NLRB and courts and state agencies. Since, they would say, it has been finally determined that the conduct complained of is not an unfair labor practice, and presumably that such conduct is not protected by the Act because of the supervisory status of the people who are the object of MEBA's effort, the state is now free to apply its own law. By-

passing any difference between the conduct now alleged and the conduct complained of in Duluth, Minnesota, plaintiffs' logic seems clear, if they properly accord final legal significance to the acts of the general counsel. But we do not read *Garmon* as permitting this result.

We consider that where a state agency or court is asked to restrain picketing which affects interstate or foreign commerce, under circumstances not within recognized areas of concurrent jurisdiction such as violent conduct, such agency or court must decline jurisdiction unless it be demonstrated that the activity is neither prohibited nor protected by NLRA. Such demonstration can be accomplished only where undisputed facts show conclusively that NLRA does not prohibit nor protect the activity, or where "compelling precedent applied to essentially undisputed facts" so shows, or NLRB has clearly so determined. Such determination is not made, however, by NLRB's failure "to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, [fol. 116] or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance." [11]

We recognize that in the circumstances of this case, the rule produces something of a paradox. MEBA's alleged organizational picketing is unlawful under Wisconsin law, and is probably not protected by federal law because of the supervisory status of the maritime engineers. Such picketing cannot be prevented by NLRB procedure unless the NLRB general counsel has probable cause to believe that MEBA's conduct is a secondary boycott. Yet since such picketing approaches being unlawful under federal law as a secondary boycott, Wisconsin must decline to enjoin it. On the record before us we can perceive no escape consistent with the *Garmon* decision.

By the Court.—Order affirmed.

---

[11] *San Diego Unions* v. *Garmon, supra,* footnote 5.

[fol. 117]

IN THE SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING MOTION FOR REHEARING—June 30, 1964

The Court being now sufficiently advised of and concerning the motion of the said appellants for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby denied with costs against said appellants.

[fol. 118] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 119]

SUPREME COURT OF THE UNITED STATES

No. 527—October Term, 1964

THE HANNA MINING COMPANY, et al., Petitioners,

v.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, et al.

ORDER ALLOWING CERTIORARI—March 15, 1965

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin, is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

TABLE OF CONTENTS.

The Opinions Below ---------- 1

Jurisdiction ---------- 2

Questions Presented ---------- 2

Statutes Involved ---------- 3

Statement of the Case ---------- 4

Reasons for Granting the Writ ---------- 11

Conclusion ---------- 28

Appendix:

Opinion and Judgment of the Supreme Court of Wisconsin ---------- 29

Order of the Supreme Court of Wisconsin Denying Motion for Rehearing ---------- 41

Memorandum Opinion of the Circuit Court for Douglas County, Wisconsin ---------- 41

Order of the Circuit Court for Douglas County, Wisconsin ---------- 46

Statutes Involved ---------- 47

TABLE OF AUTHORITIES.

Cases Cited.

Garner v. Teamsters Union, 346 U. S. 485 ---------- 24

Hourihan v. National Labor Relations Board, et al., 201 F. 2d 187 ----------13, 14

Lewis v. Labor Board, 357 U. S. 10 ---------- 14

Marine Engineers Beneficial Association v. Interlake S.S. Co., 370 U. S. 173 ----------16, 20, 22, 23

Moore Dry Dock, 92 NLRB 547 18

National Labor Relations Board v. Swift & Co., 233 F. 2d 266 14

Retail Clerks v. Schermerhorn, 373 U. S. 746 22

San Diego Unions v. Garmon, 359 U. S. 236 ..... 2, 14, 15, 16, 20

Vogt, Inc. v. International Brotherhood, 270 Wis. 315; Affirmed 354 U. S. 284 20

Weber v. Anheuser-Busch, Inc., 348 U. S. 468 24

Statutes.

Labor Management Relations Act, 29 U. S. C. A. § 141 *et seq.* 2, 3, 16

29 U. S. C. A. § 152(3) 3, 25, 47

29 U. S. C. A. § 153(d) 12

29 U. S. C. A. § 158(b)(4) and (b)(7) 3, 7, 8, 15, 17, 18, 21, 23, 24, 25, 27, 48

29 U. S. C. A. § 164(a) 3, 25, 51

28 U. S. C. A. § 1257 2

Other Authorities Cited.

2 Wisconsin Pleading & Practice, 363-364 22

U. S. Code, Congressional and Administrative News, 1959, Vol. 2, Senate Report, p. 2381 25

U. S. Code, Congressional Service, 80th Congress, First Session, Conference Report 1947, p. 1143 12

29 C. F. R. Part 101, Section 101.6 12

29 C. F. R. Part 102, Section 102.19 ..... 12, 51

In the Supreme Court of the United States

No. _____

OCTOBER TERM, 1964.

THE HANNA MINING COMPANY,
NATIONAL STEEL CORPORATION,
HANSAND STEAMSHIP CORPORATION, and
THE HANNA FURNACE CORPORATION,

Petitioners,

vs.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, an unincorporated association, RAYMOND T. McKAY, its President, MELVIN H. PELFREY, Secretary-Treasurer, CHARLES E. LaPORTE, Vice President, FRANK LECKIE, Field Representative, and JOHN DOE AND RICHARD ROE, and other individuals whose names are unknown, pickets at Great Northern Railway Company Ore Docks, Superior, Wisconsin,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Wisconsin.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Wisconsin entered in the above-entitled cause on April 13, 1964, motion for rehearing denied on June 30, 1964.

THE OPINIONS BELOW.

The Opinion of the Circuit Court for Douglas County, Wisconsin, dated July 25, 1963, and the Order thereon, dated July 26, 1963, have not been reported and are printed in the Appendix at pages 41-45, *infra*.

The Opinion of the Supreme Court of the State of Wisconsin, dated April 13, 1964, and Order denying a rehearing dated June 30, 1964, are reported in 23 Wis. (2d) 433, 127 N. W. (2d) 393, and printed in the Appendix at pages 29-41, *infra*.

JURISDICTION.

The Judgment of the Supreme Court of Wisconsin was rendered on April 13, 1964 and petitioners' Motion for Rehearing was denied on June 30, 1964, thus affirming the Order of the Circuit Court for Douglas County, Wisconsin, dismissing petitioners' amended complaint for injunctive relief against recognition and organizational picketing of petitioners' vessels by respondent labor organization in the port of Superior, Wisconsin, in a controversy involving representation of marine engineers who had been held to be supervisors by the National Labor Relations Board. The jurisdiction of this Court is invoked under Title 28, U. S. C. A., Section 1257.

QUESTIONS PRESENTED.

1. Whether or not the determinations of the General Counsel of the National Labor Relations Board affirming the dismissal of unfair labor practice charges filed under the Labor Management Relations Act, as amended, Title 29, U. S. C. A., § 141, et seq., should be accorded final legal significance upon the question of jurisdiction by the Wisconsin courts as "initial determinations" of the National Labor Relations Board within the meaning of this Court's decision in *San Diego Unions v. Garmon,* 359 U. S. 236.

2. Whether or not the state courts of Wisconsin may exercise jurisdiction to enjoin respondent labor organiza-

tion from conducting recognition and organizational picketing of petitioners' vessels in Superior, Wisconsin, which is illegal under Wisconsin law after the following initial determinations were obtained by the petitioners from the National Labor Relations Board:

(a) A dismissal of a petition for a representation election by a Regional Director and affirmed by the National Labor Relations Board upon a finding that the petitioners' marine engineers directly involved are supervisors excluded from the coverage of the Labor Management Relations Act, as amended, Title 29, U. S. C. A., § 141, et seq.;

(b) Rulings by the General Counsel of the National Labor Relations Board affirming a Regional Director that the supervisory status of the marine engineers involved precludes any application of Section 8(b)(7) of the Act to limit and restrain recogtition and organizational picketing; and

(c) A ruling by the General Counsel of the National Labor Relations Board affirming a Regional Director that there was no evidence of any secondary boycott activity prohibited by Section 8(b)(4) of the Act in the conduct of the picketing.

STATUTES INVOLVED.

The statutes involved are material parts of the Labor Management Relations Act, as amended, 29 U. S. C. A. § 141, et seq., consisting of Section 2(3) [29 U. S. C. A. § 152(3)]; Section 8(b)(4) and Section 8(b)(7) [29 U. S. C. A. § 158(b)(4) and (7)]; and Section 14(a) [29 U. S. C. A. § 164(a)]. They are reprinted in the Appendix at pages 47-51, *infra*.

STATEMENT OF THE CASE.*

Petitioners are corporations which own and operate vessels on the Great Lakes transporting cargos in interstate and foreign commerce. The Hanna Mining Company, one of the petitioners, acts as agent and operates all of these vessels as an integrated fleet.

Marine engineers licensed by the United States Coast Guard are employed on petitioners' vessels as ships officers. As part of their duties, the marine engineers supervise the work of unlicensed crew members who are represented by the United Steelworkers of America, AFL-CIO, in a bargaining unit designated by the National Labor Relations Board comprised of the vessel crews of all four petitioners.

The respondent District 2, Marine Engineers Beneficial Association (herein "MEBA") is a labor organization with a membership composed of licensed marine engineers and the remaining respondents are its officers, agents and representatives. It has labor agreements in effect with certain other companies operating vessels on the Great Lakes which contain provisions requiring compulsory Union membership as a condition of employment.

Effective October 4, 1961, petitioners entered into a labor agreement with the MEBA governing the terms of employment of licensed marine engineers employed aboard petitioners' vessels and the agreement terminated on July 15, 1962. Negotiations commenced for a new labor agreement.

During these negotiations in August 1964, a majority of the marine engineers notified the petitioners by means

---

* The facts are taken from the verified complaint, as amended, and affidavits, which were dismissed on respondent's motion (R. 9 to 19, 22 to 79), supplemented by exhibits introduced by mutual consent of the parties.

of written petitions that they did not want to be represented by the MEBA. Petitioners promptly notified the MEBA of this development and took the position that further negotiations must be suspended until the question of representation was resolved; that the MEBA should investigate the authenticity of the petitions by consulting with the marine engineers aboard their vessels; and that if the MEBA's investigation failed to confirm the authenticity of the written petitions from the marine engineers, the controversy should be submitted to arbitration. Otherwise, petitioners proposed that a secret ballot election should be conducted by an impartial party to determine whether or not the MEBA represented a majority of such engineers. If such an election demonstrated that the MEBA represented a majority, petitioners advised that they would recognize the MEBA as collective bargaining representative and resume contract negotiations.

In August and September, 1962, MEBA representatives boarded petitioners' vessels and consulted with the marine engineers. Without raising any question regarding the authenticity of the marine engineers' petitions disavowing the MEBA as collective bargaining representative, the MEBA demanded an immediate resumption of contract negotiations. Petitioners refused to recognize the MEBA unless its majority status was established by means of a proper election.

On September 12, 1962, the MEBA commenced picketing the S. S. Joseph H. Thompson, one of petitioners' vessels, at a dock in Duluth, Minnesota, where its cargo was being unloaded. The picket signs read:

"Hanna Mining Unfair
to
Marine Engineers
Beneficial Association
Refuses to Negotiate
Contract
AFL-CIO
No Dispute With Any
Other Employer
S.S. Joseph Thompson"

The dock workers refused to unload the coal cargo from petitioners' vessel because of the picketing. The work stoppage continued until September 28, 1962, when the Thompson left with the remainder of her cargo of coal aboard.

The MEBA also commenced picketing petitioners' vessels at many other Great Lakes ports on September 12, 1962, or soon thereafter, including Superior, Wisconsin. The same picket signs were used with appropriate changes for the name of each vessel.

The MEBA picketing continued until the close of the Great Lakes season of navigation on or about December 1, 1962, when all vessels were laid up, as customary, for the winter months, and the crews were laid off. As a consequence of the MEBA picket lines, petitioners' vessels had been refused tug service at many Great Lakes ports; some dock workers at Superior, Wisconsin, had refused to load iron ore cargos into such vessels; and coal dock workers at Duluth, Minnesota had refused to unload the coal cargo from the S. S. Joseph H. Thompson.

None of the licensed marine engineers, other licensed officers, or the unlicensed seamen employed on petitioners' vessels participated in any of the MEBA picketing activ-

ities and all such personnel continued working steadily aboard petitioners' vessels until the close of the navigation season in 1962. There were no work stoppages of any kind among petitioners' vessel crews.

On September 12, 1962, when the MEBA picketing commenced, petitioners requested the Regional Director of the National Labor Relations Board at Cleveland, Ohio, to conduct a representation election among the licensed marine engineers aboard petitioners' vessels under the Act to determine whether or not the MEBA represented a majority. Upon investigation, the Regional Director dismissed the petition by letter dated September 25, 1962 (R. 86, 87), for the stated reason that the marine engineers were "supervisors" excluded from the coverage of the National Labor Relations Act. Upon appeal, the National Labor Relations Board in Washington affirmed the Regional Director's dismissal by letter dated November 20, 1962 (R. 46, 47), stating that a unit of supervisors is inappropriate for collective bargaining under the Act.

On September 15, 1962, petitioners filed charges with the Regional Director of the National Labor Relations Board in Minneapolis, Minnesota, that the MEBA had engaged in secondary boycott activity violating Section 8(b)(4) of the Act (R. 79, 80). After investigation, the Regional Attorney and Regional Director dismissed the charge by letters dated October 16, 1962 (R. 88 to 89) and October 22, 1962 (R. 92 to 93), which stated that as a consequence of investigation and consideration, it was concluded that no violation of Section 8(b)(4) of the Act is indicated. Upon appeal, the General Counsel of the National Labor Relations Board in Washington affirmed the dismissal of the charge by letter dated December 10, 1962 (R. 48 to 51).

On September 27, 1962, petitioners filed charges with the Regional Director of the NLRB in Cleveland, Ohio, that the picketing of petitioners' vessels with the object of forcing or requiring plaintiffs to recognize or bargain with the MEBA as a representative of its engineers or forcing or requiring such engineers to accept the MEBA as their Union representative violated Section 8(b)(7) of the Act (R. 80 to 81) and that by these and other actions the MEBA has violated the National Labor Relations Act. After investigation, the Regional Director dismissed the charge by letter dated October 5, 1962 (R. 51 to 53).

Upon appeal, the General Counsel of the National Labor Relations Board in Washington affirmed the dismissal by letter dated November 26, 1962 (R. 53 to 55), stating that there was insufficient evidence that the picketing was for an object proscribed by Section 8(b)(7) of the Act since the MEBA was seeking representation rights in a unit composed solely of supervisors as distinguished from employees within the meaning of the Act. In response to petitioners' request for clarification, the General Counsel amplified upon the basis for affirming the Regional Director's action in a letter dated December 21, 1962 (R. 55 to 56), stating that the disposition of this case was predicated solely upon a conclusion that the supervisory status of the licensed engineers precluded a finding that the Union picketing and other activity was for an object proscribed by Section 8(b)(7) of the Act, and having reached a conclusion which, in his view, was dispositive of the charge, the appeal was denied without considering what the posture of the case would have been had the unit personnel been employees within the meaning of the said Act; that in processing the appeal in this manner, the General Counsel's office acted in accordance with its established practice and the General Counsel's office had

no alternative but to deny plaintiff's request for reconsideration.

In May 1963, Great Lakes navigation commenced and petitioners' vessels were placed into operation. The MEBA resumed picketing at Superior, Wisconsin with signs identical with those used in 1962; there had been no picketing activity during the winter while petitioners' vessels were laid up. Tugs refused to serve petitioners' vessels in Superior, Wisconsin, due to the picketing, causing some delays during adverse weather and endangered the ships and their crews in the narrow channels and confined waters of the harbor where navigation can be hazardous without the assistance of tugs. Costly delays occurred to petitioners' vessels. The licensed engineers and other crew members ignored the picketing and continued working steadily on petitioners' vessels.

On June 24, 1963, petitioners filed a verified complaint supported by affidavits (R. 9 to 19, 22 to 79) in the Circuit Court for Douglas County, Wisconsin, praying for injunctive relief against the organizational and recognition picketing conducted by the MEBA. On the following day, the court granted a temporary restraining order against the picketing and issued an order to show cause why an injunction should not be granted. Service was obtained upon the MEBA and its officers and representatives, some of whom had to be served outside of the State of Wisconsin.

The MEBA appeared specially and moved for a dismissal of the complaint on the grounds:

"1) The court lacks jurisdiction over the subject matter in that the National Labor Relations Board has exclusive jurisdiction of the subject matter herein.

"2) The court has no jurisdiction over the persons of the defendants."

An amended complaint was filed by petitioners to clarify the pleadings in response to respondent's arguments that the complaint arguably alleged facts constituting a secondary boycott within the exclusive jurisdiction of the National Labor Relations Board.

On July 25, 1963, the Circuit Court held in a Memorandum Opinion without any hearing on the merits that the court lacked jurisdiction over the subject matter, vacating the restraining order, and dismissing the complaint (R. 1 to 7).

The Circuit Court also entered an order following the Memorandum Opinion on July 26, 1963, finding that the matter before the court is within the jurisdiction of the National Labor Relations Board and that the court is without jurisdiction, dismissing the complaint, denying a restraining order and vacating the temporary restraining order (R. 7 to 9). The claim of the MEBA that the Circuit Court lacked jurisdiction over the persons of the defendants was not pressed.

An appeal was immediately taken by the petitioners from the whole of the Order of the Circuit Court to the Supreme Court of Wisconsin which affirmed the court below on April 13, 1964 (Opinion R. 105 to 116). Petitioners' motion for a rehearing was denied by the Wisconsin Supreme Court on June 30, 1964 (R. 117).

REASONS FOR GRANTING THE WRIT.

I.

The Wisconsin Supreme Court rejected petitioners' contention that the rulings of the General Counsel of the National Labor Relations Board should be accorded final legal significance upon unfair labor practice charges, and stated (R. 10 to 11, App. p. 39, *infra*):

> "Plaintiffs acknowledge the *Garmon* rule to the extent that a state agency or court has no jurisdiction over conduct arguably subject to NLRA until the NLRB has made a final determination that the conduct is not so subject. They stress the references in *Garmon* to the 'exclusive primary competence' and 'primary jurisdiction' of the NLRB and the statement that the determination must be 'left in the first instance' to NLRB, and to the statement in *Marine Engineers v. Interlake Co., Supra,* (p. 185), that 'while the Board's decision is not the last word, it must assuredly be the first.' They argue that the rulings of the General Counsel are determinations of the NLRB. Thus they assert that they have fulfilled the *Garmon* rule for avoidance of conflict between NLRB and courts and state agencies. Since, they would say, it has been finally determined that the conduct complained of is not an unfair labor practice, and presumably that such conduct is not protected by the Act because of the supervisory status of the people who are the object of the MEBA's effort, the state is now free to apply its own law. Bypassing any difference between the conduct now alleged and the conduct complained of in Duluth, Minnesota, plaintiff's logic seems clear, if they properly accord final legal significance to the acts of the General Counsel. But we do not read *Garmon* as permitting this result."

Petitioners submit that rulings of the General Counsel of the National Labor Relations Board must be accorded

the same final legal significance as determinations of the National Labor Relations Board itself upon unfair labor practice charges. Section 3(d) of the Labor Management Relations Act, as amended, 29 U. S. C. A., § 153(d), provides:

> "There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. * * * *He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 168 of this Title and in respect of the prosecution of such complaints before the Board,* and shall have such other duties as the Board may prescribe or may be provided by law." (Emphasis ours.)

In the Committee of Conference, House Report No. 510, June 3, 1947, on the Labor Management Relations Act, 1947, *U. S. Code Congressional Service, 80th Congress, First Session,* 1947, on page 1143:

> "The General Counsel * * * is to have final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges and issuance of complaints of unfair labor practices, and in respect of the prosecution of such complaints before the Board."

Under the Rules and Regulations of the National Labor Relations Board, 29 *C. F. R.*, Part 102, Section 102.19, the only review of the refusal of a Regional Director to issue a complaint upon an unfair labor practice charge is by the General Counsel. He has the final authority to determine on behalf of the Board that the Act does not apply to a particular activity. For this reason, there can never be any further determination by the Board itself when the General Counsel declines to issue a complaint based upon a lack of jurisdiction.

Statements of Procedure of the Board, Series 8, as Amended, 29 *C. F. R.*, Part 101, published pursuant to the Administrative Procedure Act, provides under Section 101.6:

> "Dismissal of charges and appeals to general counsel.—If the complainant refuses to withdraw the charge as recommended, the regional director dismisses the charge. The regional director thereupon informs the parties of his action, together with a simple statement of the grounds therefor, and the complainant of his right to appeal to the general counsel in Washington, D. C., within 10 days. If the complainant appeals to the general counsel, the entire file in the case is sent to Washington, D. C., where the case is fully reviewed by the general counsel with the assistance of his staff. Following such review, the general counsel may sustain the regional director's dismissal, stating the grounds of his affirmance, or may direct the regional director to take further action."

The published procedure of the National Labor Relations Board therefore confirms that final action upon any unfair labor practice charge which is dismissed, for lack of jurisdiction, or other grounds, is taken by the General Counsel. Such a charge never reaches the National Labor Relations Board itself and the General Counsel's determination is final.

In *Hourihan v. National Labor Relations Board et al.*, 201 F. 2d 187 on page 188:

> "Section 3(d) of the Labor Management Relations Act provides that the General Counsel of the Board 'shall have final authority on behalf of the Board, with respect to the investigation of the charges and issuance of complaints under Section 10.' The Board cannot issue an order until the General Counsel issues a complaint. A court has no power to order

the General Counsel to issue a complaint and no power to require the Board to issue an order in a matter which is not before the Board."

This Court denied certiorari in the *Hourihan* case, 345 U. S. 930, Rehearing denied 345 U. S. 961, 346 U. S. 843, 346 U. S. 880 and 346 U. S. 917.

In *Lewis v. Labor Board*, 357 U. S. 10, on pages 15-16:

"The Act does not define the term 'party'; but it does make clear that the role of the General Counsel is a major one. By Section 3(d) of the Act, he is given 'final authority' respecting the investigation of charges, the issuance of complaints and the prosecution of complaints before the Board. The General Counsel is, indeed, indispensable to the prosecution of the case. He vindicates the public interest, performing functions previously performed by the Board itself."

In *National Labor Relations Board v. Swift & Co.*, 233 F. 2d 226, on page 231:

"As heretofore noted, the Regional Director and the General Counsel upon appeal both dismissed the charges based upon primary picketing. The General Counsel's dismissal is final and not subject to appeal. 29 U. S. C. A. § 153(d); Hourihan v. National Labor Relations Board, 91 U. S. App. D. C. 316, 201 F. 2d 187; Lincourt v. National Labor Relations Board, 1 Cir., 170 F. 2d 306."

Petitioners submit that the rulings of the General Counsel, acting within the scope of his statutory authority, should have been accorded the same legal significance by the court below as the rulings of the National Labor Relations Board itself. The Wisconsin Supreme Court interpreted the rule laid down in *Garmon* as preventing this result. Apparently, the Wisconsin Supreme Court was

influenced by the language on pages 245, 246 of the *Garmon*[1] case, in which this Court stated:

> "To require the States to yield to the primary jurisdiction of the National Board does not insure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction, or the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by the refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance."

The foregoing excerpt from *Garmon*[1] certainly cannot mean that every time the General Counsel declines to file a complaint, the nature of the activity is left undetermined. Where the General Counsel, as in this case, determines that the limitations and restraints of Section 8(b)(7) of the federal Act upon organizational and recognition picketing cannot be applied because the unit personnel are supervisors and not employees within the meaning of the Act, the finding is jurisdictional because the Act excludes supervisors from its coverage. The General Counsel is empowered by law to make this finding on behalf of the Board. Therefore, state courts should be bound by such determinations of the General Counsel and apply them in subsequent litigation on the same basis as determinations made by the National Labor Relations Board itself.

---

[1] *San Diego Unions v. Garmon*, 359 U. S. 236.

An authoritative determination, by this Court, of the effect of the rulings of the General Counsel in the indicated area, is, we respectfully submit, urgently required.

II.

The Opinion of the Supreme Court of Wisconsin is based upon that Court's understanding of the principles laid down by this Court in *San Diego Unions v. Garmon*, 359 U. S. 236, and *Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U. S. 173, and certain sections of the Labor Management Relations Act, Title 29, U. S. C. A. § 141, et seq. Although the petitioners obtained "initial determinations" from the National Labor Relations Board and its General Counsel upon all of the issues regarded as arguably subject to the Labor Management Relations Act, the court below nevertheless concluded that the controversy was within the exclusive jurisdiction of the National Labor Relations Board and this pre-emption ousted the Wisconsin courts from any jurisdiction to enjoin organizational picketing of supervisors illegal under Wisconsin law. Important questions concerning the applications of the principles in *Garmon* and *Interlake* arise and should be resolved, as acknowledged by the Supreme Court in Wisconsin in its Opinion (R. 116):

> "We recognize that in the circumstances of this case, the rule produces something of a paradox. MEBA's alleged organizational picketing is unlawful under Wisconsin law, and is probably not protected by federal law because of the supervisory status of the marine engineers. Such picketing cannot be prevented by NLRB procedure unless the NLRB General Counsel has probable cause to believe that MEBA's conduct is a secondary boycott. Yet since such picketing approaches being unlawful under federal law as a secondary boycott, Wisconsin must decline to en-

join it. On the record before us, we can perceive no escape consistent with the *Garmon* decision."

Petitioners were unable to obtain a hearing on the merits before the National Labor Relations Board or in the courts of Wisconsin; the procedural problems encountered by the petitioners are demonstrated by the proceedings before the Board and in the Wisconsin courts.

The Regional Director for the NLRB in Cleveland dismissed petitioners' petition for a representation election upon the ground that the marine engineers in the unit are supervisors as defined in Section 2(11) of the Act (R. 86, 87); the Board affirmed the Regional Director's dismissal of the election petition upon the ground that a unit of supervisors is inappropriate and thus no question concerning representation exists within the meaning of the Act (R. 46, 47).

Petitioners filed charges under Section 8(b)(4) of the Act against the MEBA alleging secondary boycott activity in Duluth (R. 79, 80); similar charges were also filed against the International Longshoremens Association which represented the dock workers. While these charges were under investigation, petitioners furnished information and affidavits to the Board's Regional Director at Minneapolis regarding the picketing and other activities of the MEBA at Superior, Wisconsin, and many other Great Lakes ports.

The Regional Attorney and Regional Director ruled that no violation of Section 8(b)(4) of the Act "is indicated" on the part of the MEBA (R. 88 to 93) or "has occurred" by the International Longshoremens Association (R. 94 to 95, 90 to 91). These determinations were affirmed by the General Counsel for the NLRB (R. 48 to 51) on the ground that there was insufficient evidence to establish that either the MEBA or ILA had engaged in

any unlawful secondary activity, and that the picketing conformed to the standards prescribed for primary common situs picketing under *Moore Dry Dock*, 92 NLRB 547. With respect to picketing at other ports, including Superior, Wisconsin, the General Counsel's office stated (R. 49):

> "Furthermore, MEBA's activity at other sites does not evince an unlawful object on the part of the Union inconsistent with the ostensibly primary object of the picketing at the situs of the dispute. Nor did the totality of its conduct establish the unlawfulness of its activity."

Petitioners filed charges against the MEBA with the Board's Regional Director at Cleveland, Ohio, alleging a violation of Section 8(b)(7) of the Act (effective November 1959) which limits and restrains organizational and recognition picketing. The Regional Director dismissed the charge stating that there was insufficient evidence of picketing for an object proscribed by Section 8(b)(7) of the Act (R. 51 to 53). Upon appeal, the General Counsel for the Board sustained the ruling of the Regional Director that there was insufficient evidence of picketing proscribed by Section 8(b)(7) of the Act "particularly in view of the fact that the Union was seeking representation rights in a unit composed solely of supervisors as distinguished from employees within the meaning of the Act" (R. 53, 54). Upon request for clarification, the General Counsel's office stated that (R. 55, 56):

> "Our disposition of this case was predicated solely on our conclusion that the supervisory status of the licensed engineers precluded a finding that the union's picketing and other activity was for an object proscribed by Section 8(b)(7) of the Act. Moreover, having reached a conclusion which, in our view was dispositive of the charge in this matter, the appeal was

denied without considering what the posture of the case would have been had the unit personnel been employees within the meaning of Section 2(3) of the Act. We might add that in processing the appeal in this manner, this office acted in accordance with its established practice. Accordingly, we have no alternative but to deny your request for reconsideration and to consider this case closed."

The verified complaint thereafter filed by the petitioners in the Circuit Court for Douglas County, Wisconsin, described the steps taken with the National Labor Relations Board and copies of the various rulings were attached. Upon consideration, the Wisconsin Circuit Court dismissed the complaint, as later amended for clarification, despite the rulings of the NLRB and its General Counsel, without a hearing on the merits, stating, in part (R. 5 to 7, App. pp. 44-45, *infra*):

"At the time the original restraining order was issued, the court thought that this declination to act by the Board gave the state court jurisdiction in a case involving supervisors, but after studying labor cases for two weeks, the matter does not appear so simple. The fact that the National Labor Relations Board declined to act in a particular case does not necessarily give the state court jurisdiction. Further, we do not know the facts in the present case are exactly the same as the case which the National Labor Relations Board investigated in the fall of 1962 before it issued such order. The complaint in this case, at least 'arguably,' alleges facts which would be a secondary boycott, which are within the jurisdiction of the National Labor Relations Board.

"The United States Supreme Court has said repeatedly that the state court should stay out of labor disputes in any case in which there was a possibility that the National Labor Relations Board might have jurisdiction thereon. This means in effect that the

state court must stay out of any labor dispute affecting interstate commerce, as this dispute clearly does, unless the United States Supreme Court or the National Labor Relations Board has clearly indicated that the state court may act * * * the court cannot say that the National Labor Relations Board's actions since that date has been so definite and certain as to give the state court jurisdiction in this case."

The Supreme Court of Wisconsin affirmed its Circuit Court but noted that the alleged organizational and recognition picketing of the MEBA was unlawful in Wisconsin under the rule established by *Vogt, Inc. v. International Brotherhood*, 270 Wis. 315, affirmed 354 U. S. 284 (R. 110). The *Garmon*[1] and *Interlake*[2] cases were reviewed and the court below decided that (R. 112 to 113; App. p. 38, *infra*):

"If the activity does not constitute a secondary boycott, the reason would seem to be that the activity was no more than 'primary picketing,' and apparently the Regional Director and General Counsel were not convinced that the activity went beyond primary picketing. It would seem to us, in contemplation of the Garmon role as stated by the Supreme Court, that the drawing of the distinction between the secondary boycott and primary picketing should surely be performed by the NLRB. It may well be of significance also, that the activity considered by the General Counsel took place in Duluth, Minnesota in 1962, and the conduct which is made the basis for injunction occurred in Superior, Wisconsin, at later dates, and must at least differ in detail, if not in relevant substance."

---

[1] *San Diego Unions v. Garmon*, 359 U. S. 236.

[2] *Marine Engineers Beneficial Association v. Interlake S. S. Co.*, 370 U. S. 173.

It appears that both the Circuit Court and the Supreme Court of Wisconsin understand the decisions of this Court to require the National Labor Relations Board to make comprehensive rulings particularizing the nature of the labor activity to pave the way for state court jurisdiction. However, the Board refused to provide any opinions to the petitioners in the nature of a declaratory judgment (R. 46) which would clarify state court jurisdiction.

The scope of an initial determination of the National Labor Relations Board cannot be demonstrated without a hearing in which evidence can be introduced to show what has been initially presented to and considered by the Board. This is particularly true with regard to the MEBA picketing at Superior, Wisconsin, which was presented to the Board's Regional Director at Minneapolis by means of affidavits from witnesses in support of the petitioners' secondary boycott charges, and this Regional Director was advised of other picketing activities of the MEBA in order that a complete determination of a possible violation of Section 8(b)(4) could be made. Such matters were covered in the General Counsel's statement in the final determination on the secondary boycott charges (R. 49):

> "Nor did the totality of its conduct establish the unlawfulness of its activity."

We submit that petitioners' amended complaint presented a prima facie case of illegal organizational and recognition picketing under the Wisconsin law with these initial determinations of the Board and its General Counsel which authorized the Wisconsin courts to exercise jurisdiction and permit the petitioners to present evidence on the merits including the scope of the matters presented to the Board. The facts should not be determined by speculation. Only a hearing will enable any party in this pre-

dicament to show that state court action will not conflict with federal labor policy. The picketing at Superior, before and after the General Counsel's determination, was identical; the same picket signs were used; many of the same pickets appeared; they stood in the same place; and they acted in the same way.

When the sufficiency of a complaint is challenged, the pleader should be given the benefit of every reasonable inference from well pleaded facts. This rule prevails in Wisconsin, 2 *Wisconsin Pleading and Practice*, pages 363-364, as well as in this Court as stated in *Retail Clerks et al. v. Schermerhorn*, 373 U. S. 746 (1963), footnote, pages 753-754:

> "In any event, we have only the pleadings and we are bound to give the respondent the benefit of every reasonable inference from well pleaded facts."

The facts here closely parallel those in *Marine Engineers Beneficial Association v. Interlake S. S. Co.*, 370 U. S. 173, in which the same union picketed Great Lakes vessels in Duluth, Minnesota, to coerce the company to compel marine engineers to accept the union as bargaining agent. The MEBA picketing caused coal dock employees to refuse to unload the vessels. Interlake filed a complaint in a Minnesota court charging violations of Minnesota law without first filing with the NLRB for "initial determinations." The MEBA moved to dismiss the Minnesota state court action claiming that the dispute was arguably subject to NLRB jurisdiction. Evidence was taken on the picketing, the status of the engineers and the status of the MEBA. The Minnesota court concluded that the engineers were "supervisors" excluded from the coverage of the National Labor Relations Act, that the MEBA was not a "labor organization" within the meaning of the Act since "supervisors" were involved, denied the mo-

tion to dismiss and enjoined the picketing. The MEBA appealed to this Court, claiming potential NLRB jurisdiction of prohibited activity under Section 8(b)(4) (secondary boycott) of the federal Act and thus within the primary jurisdiction of the NLRB if the MEBA was a "labor organization." The MEBA contended that state courts were not free to decide these issues arguably subject to the Labor Management Relations Act, but that such issues must be first submitted to the NLRB for initial determinations. This Court reversed the Minnesota courts because of this failure to submit "arguable issues" for initial Board determinations.

In compliance with the principles laid down in *Interlake*,[1] *supra*, petitioners presented all of the issues to the NLRB for initial determinations. Rulings were obtained that the engineers were "supervisors," that there was no secondary boycott activity proscribed by Section 8(b)(4) of the federal Act, and that the organizational and recognition picketing limitations of Section 8(b)(7) of the Act did not apply because the engineers were supervisors. These initial determinations were furnished to the Wisconsin courts with petitioners' complaint for injunctive relief against the organizational and recognition picketing illegal under Wisconsin law. The dismissal of the petitioners' complaint was based upon the interpretation made by the Wisconsin Supreme Court of the requirements laid down by the decisions of this Court.

This petitioner, and the other litigants similarly situated, are cast into a dilemma by the view taken by the Wisconsin courts. No relief can be obtained under state law against organizational and recognition picketing by a labor organization if the unit of personnel for whom recog-

---

[1] *Marine Engineers Beneficial Association v. Interlake S. S. Co.*, 370 U. S. 173.

nition as bargaining agent is sought is composed of individuals who are excluded from the coverage of the Labor Management Relations Act, such as supervisors. The whole field of potential relief is compressed into the possibility that the labor organization may eventually violate Section 8(b)(4) of the Act by engaging in secondary boycott activity which the National Labor Relations Board will suppress. In the meantime, state limitations upon organizational picketing, according to the Wisconsin courts, cannot be applied. Thus, we submit, is untenable.

This Court has specifically held that the federal Labor Management Relations Act has not completely pre-empted the field. States are free to regulate labor activities where doing so does not conflict with matters which have been pre-empted to the National Labor Relations Board by the federal Act. As stated in *Garner v. Teamsters Union*, 346 U. S. 485, on page 488:

> "The National Labor-Management Relations Act, as we have pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible."

In *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468 on pages 480-481:

> "By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial ex-

clusion of state action. Such was the situation in Garner vs. Teamsters Union, Supra, but as the opinion in that case recalled, the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' 346 U. S., at 488. This penumbral area can be rendered progressively clear only by the course of litigation."

The concept of *partial* federal pre-emption in the regulation of labor activities is the only perceptible reason why it was considered necessary by this Court to require the submission of arguable issues to the National Labor Relations Board for initial determinations. If federal preemption were total, there would obviously be no necessity for drawing boundary lines between state and federal jurisdiction. Thus, it has been said, that union activity which is neither protected nor prohibited by the federal Act can be regulated by the states.

Individuals employed as supervisors are excluded from the coverage of the Labor Management Relations Act by Section 2(3) and Section 14(a). Hence, union activity directed against supervisors exclusively is a matter to be governed by the states or left ungoverned. Where, as in this case, the union activity involved would be proscribed by the federal Act except for the exclusion of supervisors, there cannot be any conflict with federal labor policy in the application of a similar state law to limit and restrain organizational and recognition picketing. This obviously is not an area which was purposely left open by Congress to the free interplay of economic forces and state regulation would not be repugnant to federal labor policy.

In reporting upon the amendment which added Section 8(b)(7) to the Act (effective November 13, 1959), the *Senate Report, U. S. Code Congressional and Administrative News*, 1959, Vol. 2, stated on page 2381:

"Such picketing also has a purpose of coercing the employer into recognizing the union and signing a contract with it, thus forcing the employees to join, even though the employees do not want the union as their bargaining agent. The employer is thus coerced by the threat to his business to violate the law by coercing his employees into joining the union. It would be difficult to imagine a tactic more alien to the free choice with respect to unionization that the Taft-Hartley Act guaranteed to employees."

The Courts below concluded that some issues remained arguably subject to National Labor Relations Board jurisdiction despite the final determinations by the Board and its General Counsel upon these same issues. For example, the Supreme Court of Wisconsin stated (R. 114, App. pp. 38-39, *infra*):

"If the picketing were deemed no more than primary, and if the marine engineers whom MEBA is seeking to represent were non-supervisory, plaintiff's claim arguably charges an unfair labor practice under Section 8(b)(7) of NLRA making it an unfair labor practice for a labor organization to picket an employer in order to force him to recognize it as a representative of employees for whom it has not been properly certified. Plaintiffs do not appear to claim that it is not arguable that the marine engineers are employees under the Act. Indeed, they filed the charge on the basis (presumably) that they were employees, and are asking the state courts to proceed upon the General Counsel's refusal to file a complaint."

The Circuit Court of Wisconsin stated (R. 6, App. p. 45, *infra*):

"The complaint in this case, at least, 'arguably' alleges facts which would be secondary boycott, which are within the jurisdiction of the National Labor Relations Board."

The Courts below should have accepted and applied the "initial determinations" of the Board and its General Counsel but refused to do so. Instead, the Circuit Court regarded the possibility of secondary boycott activity as "arguable" even though the General Counsel ruled that there was no evidence of such activity proscribed by the federal Act, and the Wisconsin Supreme Court thought that the petitioners conceded the continued "arguability" of the marine engineers' status as "employees" under the federal Act by filing a charge under Section 8(b)(7) alleging organizational and recognition picketing and then requesting the state courts to proceed to enjoin the same picketing upon the General Counsel's refusal to file a complaint.

We submit that the determinations of the National Labor Relations Board and its General Counsel must be accepted as final by the courts. Otherwise, a "paradox" results because the "special competence" of the National Labor Relations Board is ignored. This, in effect, creates total rather than partial pre-emption because the arguability presented in any issue cannot be resolved. If a cohesive national labor policy requires initial determinations by the Board, then those same determinations must be adopted as final to maintain a uniform policy.

The status of state court jurisdiction after "arguable issues" have been resolved by "initial determinations" of the National Labor Relations Board and its General Counsel should be clarified. Under the initial determinations in this case, petitioners submit that the Wisconsin courts should have asserted jurisdiction and permitted petitioners an opportunity to present their evidence, which would include the scope of the Board rulings. A litigant denied National Labor Relations Board relief with finality based upon the exclusion of personnel and activity from the

coverage of the federal Act and who thereafter seeks a remedy under state law ought to be granted a hearing in which any alleged arguability remaining can be fully developed and considered. Otherwise, the procedural rules laid down by this Court for molding a cohesive national labor policy are twisted into an obstacle to state jurisdiction which could not have been intended and used to protect organizational and recognition picketing which is illegal under both state and federal law.

CONCLUSION.

This case contains fundamental questions involving practice and procedure under an important federal statute. It also involves the equally important question of the function and power of the state courts in the field of labor relations. This petition for a writ of certiorari should be granted so that they can be resolved.

Respectfully submitted,

LUCIAN Y. RAY,
860 Union Commerce Building,
Cleveland, Ohio, 44114,
Counsel for Petitioners.

JOHN H. HANNINEN,
McCREARY, HINSLEA & RAY,
860 Union Commerce Building,
Cleveland, Ohio, 44114,

JOHNSON, FRITSCHLER, WITKIN & JOHNSON, LTD.
304-308 Telegram Building,
Superior, Wisconsin, 54881,
Of Counsel.

APPENDIX.

OPINION AND JUDGMENT OF THE SUPREME COURT OF WISCONSIN.

(Filed April 13, 1964.)

(Caption omitted.)

APPEAL from an order of the circuit court for Douglas County, ALLEN KINNEY, Circuit Judge. *Affirmed.*

Action by The Hanna Mining Company, National Steel Corporation, Hansand Steamship Corporation and The Hanna Furnace Corporation, against District 2, Marine Engineers Beneficial Association, AFL-CIO (hereinafter called MEBA), and several of its officers, to enjoin defendants, agents, officers and members of MEBA, and others acting in concert with them from picketing plaintiffs' vessels and the docks where they are located.

The action was commenced June 25, 1963, by service of a summons, complaint, order to show cause and restraining order, and supporting affidavits. Defendants appeared specially and moved for dismissal on the ground (not involved on this appeal) of lack of jurisdiction over the persons of defendants and on the ground that "The Court lacks jurisdiction over the subject matter in that the National Labor Relations Board has exclusive jurisdiction of the subject matter herein." Affidavits supporting the motion were also filed. On July 15, 1963, after hearing on the motion, but before decision thereof, an amended complaint was served.

On July 26, 1963, the circuit court entered an order dismissing the complaint on the ground of lack of jurisdiction because the matter is within the jurisdiction of the NLRB, and vacating the restraining order. Plaintiffs appealed. Various proceedings were later had, not directly involved on this appeal, under which the restraining order

was continued in effect pending the appeal, but was vacated October 30, 1963, upon posting of bond by defendants.

The following facts appear, in substance, from the amended complaint and affidavits on file:

Plaintiff corporations own and operate vessels on the Great Lakes transporting cargoes in interstate and foreign commerce. One of the plaintiffs, The Hanna Mining Company, acts as the operating agent for all of the plaintiff's vessels, which are operated as one integrated fleet. The defendant association (MEBA) is a labor organization with a membership composed of licensed marine engineers.

Effective October 4, 1961, Hanna Mining entered into a labor agreement with MEBA governing the terms of employment of licensed marine engineers employed aboard plaintiffs' vessels, and this agreement terminated July 15, 1962. During subsequent negotiations a majority of such engineers notified Hanna Mining that they did not want to be represented by MEBA and Hanna Mining took the position that further negotiations with MEBA must be suspended until a majority voted for MEBA in a secret ballot election.

Plaintiffs alleged in the amended complaint that on September 12, 1962, MEBA commenced picketing plaintiffs' vessels in Superior, Wisconsin, and other ports

> "with the unlawful objectives of forcing, coercing and compelling plaintiffs to recognize and bargain with [MEBA] as the union representative of the said engineers and forcing, coercing and compelling the said engineers to join, accept and select [MEBA] as their collective bargaining representative without any opportunity to determine whether or not [MEBA] represented a majority of the said engineers by means of a properly conducted election * * *."

They alleged that the picketing continued until the close of the 1962 navigation season, and was resumed at the commencement of navigation in April, 1963.

Plaintiffs also alleged in the amended complaint

> "that the said picketing has had and will continue to have the harmful effect of causing work stoppages among individuals employed by other employers and of preventing harbor tugs from rendering towage services, all of which delay and endanger plaintiffs' vessels, thus inflicting economic losses to plaintiffs and causing hazards to such vessels and their crews because dock workers, tug crews and other individuals employed by other employers decline to cross picket lines or are caused to refuse to perform services for plaintiffs as a result of the said picketing * * *."

On September 12, 1962, Hanna Mining filed a petition with the regional director of NLRB at Cleveland, Ohio, requesting a representation election with respect to its marine engineers. The regional director dismissed the petition, stating that:

> "As a result of the investigation, it appears that, because the employees in the proposed unit are not employees within the meaning of Section 2(3) of the Act, being employed as supervisors as defined in Section 2(11) of the Act, further proceedings are not warranted at this time."

Upon request for review, the NLRB

> "concluded that, as the Appellant's appeal makes no affirmative claim that a majority of the 'employees' as distinguished from 'supervisors' are sought to be represented in an appropriate unit and as a unit of supervisors is otherwise inappropriate, no question concerning representation in an appropriate unit exists * * *
>
> "Moreover, the apparent request of the Appellant for a declaratory judgment by the Board cannot be

considered in an original representation proceeding * * *. Accordingly, the Regional Director's dismissal of the petition was warranted."

On September 15, 1962, Hanna Mining filed a charge with the regional director of NLRB at Minneapolis, Minnesota, claiming that MEBA had engaged in illegal secondary boycott activity which would be an unfair labor practice under Sec. 8(b)(4) of NLRB by inducing and encouraging individuals employed by the North Western Hanna Fuel Company at Duluth, to engage in a boycott of one of these vessels. The regional director refused to issue a complaint, stating that investigation indicated that the inducement of the employees of secondary employers was limited to inducing them to cease performing services aboard the ship.

Upon appeal, the general counsel of NLRB sustained the regional director's ruling, saying:

"* * * It was concluded that the evidence was insufficient to establish that either respondent engaged in unlawful secondary activity, as alleged. In this connection, the evidence revealed that the picketing by MEBA at the common situs herein conformed to *Moore Dry Dock* standards (92 NLRB 547), notwithstanding that picketing continued after the vessel was abandoned (cf. *Ingram Barge Co.*, 136 NLRB No. 112), and that oral appeal by MEBA pickets to personnel of the neutral employer were for action solely with respect to the primary situs and did not constitute unlawful activity within the meaning of Section 8(b)(4) of the Act. Cf. *Pure Oil Company*, 84 NLRB 315. Furthermore, MEBA's activity at other sites did not evince an unlawful object on the part of the Union inconsistent with the ostensibly primary object of the picketing at the situs of the dispute. Nor did the totality of its conduct establish the unlawfulness of its activity."

On September 27, 1962, Hanna Mining filed a charge with the regional director of NLRB at Cleveland, Ohio, claiming that MEBA had engaged in an unfair labor practice under Sec. 8(b)(7) of NLRA by picketing the vessels with the unlawful object of forcing plaintiffs to bargain with MEBA or forcing the engineers to accept MEBA as their representative. The regional director refused to issue a complaint because "there is insufficient evidence that there was picketing of, or a threat to picket, an employer for an object proscribed by Section 8(b)(7) of the Act * * *."

Upon appeal, the general counsel sustained the ruling of the regional director, and explained:

> "Our disposition of this case was predicated solely on our conclusion that the supervisory status of the licensed engineers precluded a finding that the Union's picketing and other activity was for an object proscribed by Section 8(b)(7) of the Act * * *."

Counsel for MEBA filed an affidavit establishing that NLRB has ruled in other cases that MEBA is a labor organization within the meaning of NLRA because some of its members are not supervisors and are employees within the meaning of NLRA.

No claim is made that the picketing involved or threatened violence.

FAIRCHILD, J. The gist of plaintiff's claim, upon the merits, appears to be that MEBA's picketing, although non-violent, is for an unlawful purpose, and plaintiffs are therefore entitled to an injunction. Allegedly, MEBA is attempting to coerce plaintiffs to bargain with MEBA as the representative of the marine engineers, against the wishes of a majority of the latter. The picketing is allegedly intended to induce others to refuse to perform essential

services for plaintiffs' vessels, in order to present plaintiffs with the choice between suffering substantial loss and unlawfully bargaining with MEBA. Under a similar theory, this Court affirmed an injunction against otherwise peaceful picketing in *Vogt, Inc. v. International Brotherhood.*[1]

Because of the nature of plaintiffs' business, the effect of disruptions therein upon interstate and foreign commerce is obvious. Plaintiffs are employers within the meaning of NLRA,[2] and their nonsupervisory personnel are employees within its meaning. MEBA on the other hand has been held by NLRB to be a labor organization within the meaning of NLRA because some of the members of MEBA are employees as defined in NLRA.[3] Thus the question immediately arises whether a state court has any jurisdiction to deal with the merits of the matter.

The general rule (in the absence of mass picketing, violence or overt threats of violence[4]) and some of the considerations upon which the rule is based, have been laid down by the Supreme Court of the United States in *San Diego Unions v. Garmon*[5] as follows:

> "At times it has not been clear whether the particular activity regulated by the States was governed by Sec. 7 or Sec. 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the adminis-

---

[1] (1956), 270 Wis. 315, 71 N. W. (2d) 359, affirmed in *Teamsters Union v. Vogt, Inc.* (1957), 354 U. S. 284, 77 Sup. Ct. 1166, 1 L. Ed. (2d) 1347.

[2] 29 USCA Sec. 141ff.

[3] See *Marine Engineers v. Interlake Co.* (1962), 370 U. S. 173, 82 Sup. Ct. 1237, 8 L. Ed. (2d) 418.

[4] *Auto Workers v. Wisconsin Board* (1956), 351 U. S. 266, 76 Sup. Ct. 794, 100 L. Ed. 1162; *Youngdahl v. Rainfair, Inc.* (1957), 355 U. S. 131, 78 Sup. Ct. 206, 2 L. Ed. (2d) 151.

[5] (1959), 359 U. S. 236, 244, 245, 246, 79 Sup. Ct. 773, 3 L. Ed. (2d) 775.

tration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board.

"* * *

"To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by Sec. 7, or prohibited by Sec. 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in *Guss v. Utah Labor Relations Board,* 353 U. S. 1. In that case we held that failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. The withdrawal of this narrow area from possible state activity follows from our decisions in *Weber* and *Guss.* The governing consideration is that

to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."

In later cases, the Supreme Court of the United States has held that state courts have no power to enjoin activity which is an arguable violation of sec. 8(b) of the NLRA,[6] or is arguably protected by the NLRA.[7]

The *Garmon* rule has been recently applied by the Supreme Court of the United States to the question of whether an organization (MEBA, as it happens) is a labor organization under NLRA. Where MEBA's conduct was of a kind arguably prohibited by NLRA if MEBA were a labor organization under NLRA, a state court must decline to assert jurisdiction over the activity as soon as the evidence before it is sufficient to show that MEBA is "arguably a 'labor organization'."[8]

Picketing of a type commonly referred to as recognition picketing is made an unfair labor practice by Sec. 8(b)(7) of NLRA, but such is not an unfair labor practice in the present case if the objects of the picketing, *viz*: the plaintiffs' marine engineers, are deemed supervisory personnel and thus are not employees within the meaning of NLRA. Sec. 8(b)(4), however, prohibits secondary boycotting which occurs when a union directs pressure, whether by strike or otherwise, against an employer or

---

[6] *Construction Laborers v. Curry* (1963), 371 U. S. 542, 546, 83 Sup. Ct. 531, 9 L. Ed. (2d) 514.

[7] *Liner v. Jafco, Inc.* (1964), 375 U. S. 301, 84 Sup. Ct. 391, 11 L. Ed. (2d) 347.

See *Local 248, U. A., A. & A. I. W. v. Wisconsin E. R. Board* (1960), 11 Wis. (2d) 277, 105 N. W. (2d) 271, certiorari denied (1961), 365 U. S. 878, 81 Sup. Ct. 1028, 6 L. Ed. (2d) 190, and *Markham v. American Motors Corp.* (1964), 22 Wis. (2d) 680, 685, 126 N. W. (2d) 753, at 755.

[8] *Marine Engineers v. Interlake Co., supra*, p. 177, footnote 3.

other person with whom it has no dispute or grievance, for the purpose of persuading or coercing that neutral person to stop dealing with a primary party with whom the union has a dispute, as a means of exerting pressure on the primary party.[9] Sec. 8(b)(4) of the NLRA provides as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(4) (i) to engage in or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"* * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title: *Provided*, that nothing contained in the clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

"* * *" [10]

---

[9] See CCH, Labor Law Reporter, para. 5220, p. 10,534 ff.

[10] 29 USCA, p. 54, sec. 158.

As seen from the foregoing there is or may be a common denominator between recognition picketing and secondary boycotting. In both coercion may be accomplished through the effect of the activity upon neutral third parties. Plaintiffs' claim that MEBA, considered as a labor organization, is coercing plaintiffs by inducing work stoppages among dock workers and tug crews, employed by others, arguably charges an unfair labor practice under sec. 8(b)(4)(B) of NLRB, relating to so-called secondary boycott. If the activity does not constitute a secondary boycott, the reason would seem to be that the activity was no more than "primary picketing," and apparently the regional director and general counsel were unconvinced that the activity went beyond primary picketing. It would seem to us, in contemplation of the *Garmon* rule as stated by the supreme court, that the drawing of the distinction between a secondary boycott and primary picketing should surely be performed by the NLRB. It may well be of significance also, that the activity considered by the general counsel took place in Duluth, Minnesota, in 1962, and the conduct which is made the basis for injunction occurred in Superior, Wisconsin, at later dates, and must at least differ in detail, if not in relevant substance.

If the picketing were deemed no more than primary, and if the marine engineers whom MEBA is seeking to represent were non-supervisory, plaintiffs' claim arguably charges an unfair labor practice under sec. 8(b)(7) of NLRB making it an unfair labor practice for a labor organization to picket an employer in order to force him to recognize it as the representative of employees for whom it has not been properly certified. Plaintiffs do not appear to claim that it is not arguable that the marine engineers are employees under the Act. Indeed they filed a charge

on the basis (presumably) that they were employees, and are asking the state courts to proceed upon the general counsel's refusal to file a complaint.

Plaintiffs acknowledge the *Garmon* rule to the extent that a state agency or court has no jurisdiction over conduct arguably subject to NLRA until the NLRB has made a final determination that the conduct is not so subject. They stress the references in *Garmon* to the "exclusive primary competence" and "primary jurisdiction" of the NLRB and the statement that the determination must be "left in the first instance" to NLRB, and to the statement in *Marine Engineers v. Interlake Co., supra* (p. 185), that "While the Board's decision is not the last word, it must assuredly be the first." They argue that the rulings of the general counsel are determinations of the NLRB. Thus they assert that they have fufilled the *Garmon* rule for avoidance of conflict between NLRB and courts and state agencies. Since, they would say, it has been finally determined that the conduct complained of is not an unfair labor practice, and presumably that such conduct is not protected by the Act because of the supervisory status of the people who are the object of MEBA's effort, the state is now free to apply its own law. Bypassing any difference between the conduct now alleged and the conduct complained of in Duluth, Minnesota, plaintiffs' logic seems clear, if they properly accord final legal significance to the acts of the general counsel. But we do not read *Garmon* as permitting this result.

We consider that where a state agency or court is asked to restrain picketing which affects interstate or foreign commerce, under circumstances not within recognized areas of concurrent jurisdiction such as violent conduct, such agency or court must decline jurisdiction unless it be demonstrated that the activity is neither prohibited nor

protected by NLRA. Such demonstration can be accomplished only where undisputed facts show conclusively that NLRA does not prohibit nor protect the activity, or where "compelling precedent applied to essentially undisputed facts" so shows, or NLRB has clearly so determined. Such determination is not made, however, by NLRB's failure "to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance." [11]

We recognize that in the circumstances of this case, the rule produces something of a paradox. MEBA's alleged organizational picketing is unlawful under Wisconsin law, and is probably not protected by federal law because of the supervisory status of the marine engineers. Such picketing cannot be prevented by NLRB procedure unless the NLRB general counsel has probable cause to believe that MEBA's conduct is a secondary boycott. Yet since such picketing approaches being unlawful under federal law was a secondary boycott, Wisconsin must decline to enjoin it. On the record before us we can perceive no escape consistent with the *Garmon* decision.

By the Court.—Order affirmed.

---

[11] *San Diego Unions v. Garmon, supra,* footnote 5.

ORDER OF THE SUPREME COURT OF WISCONSIN DENYING MOTION FOR REHEARING.

And afterwards to-wit on the 30th day of June, A. D. 1964, the same being the 135th day of said term, the following proceedings were had in said cause in this court:

(Caption omitted.)

The Court being now sufficiently advised of and concerning the motion of the said appellants for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby denied with costs against said appellants.

MEMORANDUM OPINION OF THE CIRCUIT COURT FOR DOUGLAS COUNTY, WISCONSIN.

(Dated July 25, 1963.)

(Caption omitted.)

The dispute in the above case arose from the picketing of an ore carrying boat in the harbor of Superior, Wisconsin. The operator of the boat is the Hanna Mining Company, a Delaware corporation with its principal office and place of business at 1300 Leader Building, Cleveland 14, Ohio, and the organization doing the picketing was District 2 of the Marine Engineers Beneficial Association, AFL-CIO, 190—21st Street, Brooklyn 32, New York, an unincorporated association. Said association, hereinafter designated "MEBA," has been picketing all boats owned by said Hanna Company wherever they appear on the Great Lakes since September of 1962. All unlicensed personnel employed by the Hanna Company are represented

by the United States Steel Workers of America, Local 7000, AFL-CIO, and they are not involved in this matter and apparently take no cognizance of the picketing by MEBA. The object of the picketing by MEBA is to organize the licensed personnel on Hanna boats, the engineers.

On the 25th day of June, 1963, an order was issued by this Court temporarily restraining said picketing, said order being returnable at 10:00 o'clock on the 1st day of July, 1963. The hearing on said matter was postponed by agreement of counsel to the 8th day of July, 1963 at 10:00 o'clock a.m. and on said date argument was held, the plaintiffs being represented by Johnson, Fritschler, Barstow and Witkin, Superior, Wisconsin, by B. B. Barstow and Paul Witkin, Montague, Applequist, Lyons, Nolan, Donovan and Kretsch, Duluth, Minnesota, by Kermit Kretsch, and by McCreary, Hinslea and Ray, Cleveland, Ohio, by John Hanninen. The defendants were represented by Borg, McGill and Moodie, Superior, Wisconsin, by P. G. McGill, and by Pressman and Scribner of New York, New York, by David Scribner.

The first issue to be decided in this case, as it is in every case in which a state court is involved in a labor matter, is whether the state court has jurisdiction over the matter at all, or whether the matter is within the jurisdiction of the National Labor Relations Board, and the argument had on July 8, 1963 was restricted to such point. The facts in this case to begin with seem to be very similar to the facts in Marine Engineers Beneficial Association vs. Interlake Steamship Company, 370 U. S. 173, decided by the Supreme Court on June 11, 1962. That was a case in which the same defendant as here involved was picketing a ship in the harbor in Duluth, Minnesota in the same manner as was done in this case. The District

Court in Duluth issued a restraining order restraining such picketing just as was done in this case. The union appealed the case to the Minnesota Supreme Court and the Minnesota Supreme Court affirmed the lower court. The Minnesota court reasoned that the matter was not within the jurisdiction of the National Labor Relations Board because the persons that MEBA was trying to organize were not employees but were supervisors within the meaning of the National Labor Relations Act, and the National Labor Relations Act does not apply to supervisors. The Union appealed the case to the United States Supreme Court and the United States Supreme Court reversed the Minnesota court. In its reversal the United States Supreme Court quoted extensively from the case of San Diego Building Trades Council vs. Garmon, 3 L. Ed. 2d 775, decided January 20, 1959, in which the court had stated that if any matter was arguably within the jurisdiction of the National Labor Relations Board, then the state court should defer to the National Labor Relations Board, and the initial determination as to whether such matter was or was not within the jurisdiction of the National Labor Relations Board should be determined by the Board. The court said that because of the fact that plaintiff below had alleged the violations of Section 8(b)(4) of the Act, the provision prohibiting secondary boycotts, such matter might be within the jurisdiction of the National Labor Relations Board. This was because, even though the persons that MEBA was attempting to organize in this particular case were all supervisors, MEBA did have certain members at other locations that were employees, so that MEBA was a labor organization within the meaning of the Act, and any violation of Section 8(b)(4) by a labor organization did come within the jurisdiction of the National Labor Relations Board.

Now we get to the difference between this case and the Minnesota case. The plaintiff in this case tried to follow the advice of the Supreme Court in the Minnesota case. When MEBA began picketing its ships in September of 1962, the plaintiff Hanna Mining Company did not come directly to the state court. It filed charges with the National Labor Relations Board. In fact, it filed two different charges with the National Labor Relations Board, one alleging that MEBA had violated Section 8(b)(4) of the Act, and a second, that MEBA had violated Section 8(b)(7) of the Act, a provision which prohibits organizational picketing except in certain circumstances specified in the Act.

The National Labor Relations Board dismissed the petition alleging violation of Section 8(b)(4) of the Act, stating that the activities alleged by MEBA did not violate such section. The National Labor Relations Board also refused to issue a complaint for a violation of Section 8(b)(7) of the Act, but the reason they gave for failure to issue a complaint in this case was that they could not do so for the reason that the persons MEBA was attempting to organize were all supervisors. They stated that they did not consider whether the particular acts alleged would have been a violation of Section 8(b)(7) if the persons that MEBA was attempting to organize had been employees, but such persons being supervisors, they were dismissing the complaint. At the time the original restraining order was issued, the Court thought that this declination to act by the Board gave the state court jurisdiction in a case involving supervisors, but after studying labor cases for two weeks, the matter does not appear so simple. The fact that the National Labor Relations Board declined to act in a particular case does not necessarily give the state court jurisdiction. Further, we do not know that the

facts in the present case are exactly the same as the case which the National Labor Relations Board investigated in the Fall of 1962 before it issued such order. The complaint in this case, at least, "arguably," alleges facts which would be a secondary boycott, which are within the jurisdiction of the National Labor Relations Board.

The United States Supreme Court has said repeatedly that the state courts should stay out of labor disputes in any case in which there was a possibility that the National Labor Relations Board might have jurisdiction thereof. This means in effect that the state court must stay out of any labor dispute affecting interstate commerce, as this dispute clearly does, unless the United States Supreme Court or the National Labor Relations Board has clearly indicated that the state court may act. The last word from the United States Supreme Court on a matter similar to this is the Minnesota case cited above decided June 11, 1962 in which case the United States Supreme Court said the state court should stay out. The Court cannot say that the National Labor Relations Board's action since that date has been so definite and certain as to give the state court jurisdiction in this case.

Therefore, it is determined that the Court does not have jurisdiction in this case, and the restraining order must be vacated and the complaint dismissed with costs. Attorneys for defendants may draw the order.

Dated July 25, 1963.

BY THE COURT:

ALLEN KINNEY, *Circuit Judge.*

ORDER OF THE CIRCUIT COURT FOR DOUGLAS COUNTY, WISCONSIN.

(Dated July 26, 1963.)

(Caption omitted.)

The above entitled matter having come before the Court pursuant to an Order to Show Cause herein dated June 25, 1963, and an Order having been thereon issued by this Court temporarily restraining picketing alleged in the Petition, Affidavits and Complaint on file herein, and said Order being returnable on July 1, 1963 and adjourned by Stipulation to July 8, 1963 on which date plaintiffs having appeared by Johnson, Fritschler, Barstow & Witkin of Superior, Wisconsin, by B. B. Barstow and Paul Witkin, and Montague, Applequist, Lyons, Nolan, Donovan and Knetsch of Duluth, Minnesota, by Kermit Knetsch, and by McCreary, Hinslea and Ray, Cleveland, Ohio, by John Hanninen, and the defendants specially appearing by Borg, McGill & Moodie of Superior, Wisconsin, by P. G. McGill, and by Pressman and Scribner of New York, New York, by David Scribner, and Motion having been filed by the defendants to dismiss the Complaint and to vacate the temporary restraining order, and the Court having read the Affidavits of the parties and having heard the arguments of counsel and being fully informed in the premises, and the Court having filed its Memorandum Opinion herein, the same having been served on the representative counsel, and the Court finding that the matter now before the Court is within the jurisdiction of the National Labor Relations Board and that this Court is without jurisdiction;

IT IS ORDERED that the Motion of the defendants to dismiss plaintiff's Complaint is granted and plaintiffs' Complaint is dismissed with costs to defendants.

IT IS FURTHER ORDERED that the plaintiff's application for a restraining order be and the same is hereby denied.

IT IS FURTHER ORDERED that the temporary restraining order issued by this Court on June 25, 1963, be and the same is hereby vacated for all purposes.

Dated July 26, 1963.

BY THE COURT:

ALLEN KINNEY, *Judge.*

STATUTES INVOLVED.

29 U. S. C. A. § 152(3).

"§ 152. Definitions

"When used in this subchapter—

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

29 U. S. C. A. § 158.

"§ 158. Unfair labor practices

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

"(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the

representative of such employees under the provisions of section 159 of this title;

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

"Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution:

* * * * *

"(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as

the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

"(A) Where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title.

"(B) where within the preceding twelve months a valid election under section 159 (c) of this title has been conducted, or

"(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

"Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection."

29 U. S. C. A. § 164.

"§ 164. Supervisors as union members; recognition by employers

"(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

29 C. F. R., Part 102,

Section 102.19.

Review by the general counsel of refusal to issue.—If, after the charge has been filed, the regional director declines to issue a complaint, he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds. The person making the charge may obtain a review of such action by filing a request therefor with the general counsel in Washington, D. C., and filing a copy of the request with the regional director, within 10 days from the service of the notice of such refusal by the regional director. The request shall contain a complete statement setting forth the facts and the reasons upon which the request is based.

COPY

Office-Supreme Court, U.S.
FILED
OCT 15 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 7

THE HANNA MINING COMPANY, NATIONAL STEEL CORPORATION, HANSAND STEAMSHIP CORPORATION, and THE HANNA FURNACE CORPORATION,

Petitioners,

vs.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, an unincorporated association, RAYMOND T. MCKAY, its President, MELVIN H. PELFREY, Secretary-Treasurer, CHARLES E. LAPORTE, Vice-President, FRANK LECKIE, Field Representative, and JOHN DOE AND RICHARD ROE, and other individuals whose names are unknown, pickets at Great Northern Railway Company Ore Docks, Superior, Wisconsin,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

BRIEF FOR RESPONDENTS IN OPPOSITION

LEE PRESSMAN,
DAVID SCRIBNER,
50 Broadway,
New York, N. Y. 10004,
Counsel for Respondents.

JOAN STERN KIOK,
of Counsel.

INDEX

PAGE

Questions Presented 1

Statement 2

ARGUMENT:

I. The decision below is clearly correct 4

A. No Charge Was Filed With NLRB and No Determination Was Ever Made by the NLRB Regarding the Legality of the Picketing Activity in Superior, Wisconsin; Such Picketing Was Arguably Subject to Section 8(b)(4) of the Act and the State Court Was Without Power to Enjoin Such Conduct .. 4

B. Assuming That the Charges Filed With the NLRB Covered the Picketing in Superior, Wisconsin, the State Court Had No Jurisdiction to Enjoin Peaceful Picketing Which Arguably Constituted a Secondary Boycott Subject to NLRB Jurisdiction, Since the NLRB Had Refused to Issue a Complaint Thereon Solely Because of Insufficient Evidence 5

II. There is no conflict of decision 8

Conclusion 9

Citations

CASES:

Garner v. Teamsters, 346 U. S. 485 (1953) 6, 8

Graybar Electric Co. v. Automotive Industries Employees, 365 Mo. 753, 287 S. W. 2d 794 (1956) 5

Guss v. Utah Labor Relations Board, 353 U. S. 1 (1956) 6, 8

PAGE

CASES (Cont'd):

Hanna Mining Co. v. MEBA, 23 Wisc. 2d 433, 127 N. W. 393 (1964) 4

Local 20, Teamsters Union v. Morton, 377 U. S. 252 (1964) 7,8

Local 100, United Ass'n of Journeymen v. Borden, 373 U. S. 690 (1963) 6

Marine Engineers Beneficial Ass'n v. Interlake S.S. Co., 370 U. S. 173 (1962) 5

Mississippi Valley Electric Co. v. Teamsters, 229 La. 37, 85 So. 2d 22 (1955) 6

San Diego Building Trades v. Garmon, 359 U. S. 236 (1959) 4, 6, 7, 8

Wilmot v. Frank, 19 App. Div. 2d 542 (N. Y. 1963) 6

UNITED STATES STATUTES:

National Labor Relations Act, as amended, 61 Stat. 136 (1947), 29 U. S. C. Sections 151-168 2,8

Section 2(3) 2

Section 2(11) 2

Section 8(b)(4) 1, 2, 3, 4, 5, 6, 7, 8

Section 8(b)(7) 1, 2, 3, 4, 6, 8

IN THE

Supreme Court of the United States

October Term, 1964

No. 527

THE HANNA MINING COMPANY, NATIONAL STEEL CORPORATION, HANSAND STEAMSHIP CORPORATION, and THE HANNA FURNACE CORPORATION,

Petitioners,

vs.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, an unincorporated association, RAYMOND T. McKAY, its President, MELVIN H. PELFREY, Secretary-Treasurer, CHARLES E. LaPORTE, Vice-President, FRANK LECKIE, Field Representative, and JOHN DOE AND RICHARD ROE, and other individuals whose names are unknown, pickets at Great Northern Railway Company Ore Docks, Superior, Wisconsin,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

BRIEF FOR RESPONDENTS IN OPPOSITION

Questions Presented

1. Whether a state court may enjoin peaceful picketing by a labor organization where the NLRB has never ruled on the specific picketing sought to be enjoined and such picketing arguably constitutes secondary boycott activity in violation of Section 8(b)(4) of the Act and occurred at a different situs from activity which was the subject of an 8(b)(4) charge filed with the NLRB.

2. Whether the state court properly refused to enjoin peaceful picketing by a labor organization (a) where the General Counsel of the National Labor Relations Board refused to issue a complaint on petitioners' charge of violation of Section 8(b)(4) of the National Labor Relations Act on the ground that the evidence was insufficient to establish unlawful secondary activity, and (b) where the General Counsel of the NLRB refused, because of the supervisory status of the employees involved, to issue a complaint on petitioners' charge that the same picketing also constituted organizational picketing in violation of 8(b)(7) of the Act.

Statement

Petitioners seek to upset a decision of the Wisconsin Supreme Court which held that the state court did not have jurisdiction to enjoin peaceful picketing by members of respondent Union because the regulation of such activity is exclusively within the jurisdiction of the NLRB.

Respondent Union was the exclusive bargaining agent for the employees of the petitioners under an agreement entered into between the parties on October 4, 1961 following a secret election among said employees, which agreement expired by its terms on July 15, 1962. On September 12, 1962, after a period of unsuccessful negotiations for a new contract the Union began picketing the petitioners' vessels. (R. 71-73).

On September 12, 1962, petitioners filed a petition for a representation election with the Regional Director of the National Labor Relations Board. The Regional Director dismissed the petition on the grounds that "the employees in the proposed unit are not employees within the meaning of Section 2(3) of the Act,[1] being employed as supervisors as defined in Section 2(11)." (R. 86).

---

[1] National Labor Relations Act, as amended, 61 Stat. 136 (1947), 29 U. S. C. § 151-168.

On September 15, 1962, petitioners filed a charge with the Regional Director of the National Labor Relations Board claiming that respondents' picketing in *Duluth, Minnesota* constituted secondary boycott activity in violation of Section 8(b)(4) of the Act. (R. 79-80). The Regional Director refused to issue a complaint and the General Counsel sustained his ruling on the ground that "the evidence was insufficient to establish that either respondent engaged in unlawful secondary boycott activity as alleged." (R. 48-49).

On September 27, 1962, the petitioners filed a charge with the Regional Director of the National Labor Relations Board claiming that the very conduct which it had charged constituted illegal secondary boycott activity, violated Section 8(b)(7) of the National Labor Relations Act as illegal recognition and organizational picketing. (R. 80-81). The Regional Director refused to issue a complaint and the General Counsel sustained his ruling on the ground that "the Union was seeking representation rights in a unit composed solely of supervisors as distinguished from employees within the meaning of the Act." (R.54).

On June 25, 1963, petitioners instituted an action in the Circuit Court for Douglas County in the State of Wisconsin, to enjoin the picketing being conducted by respondent Union in *Superior, Wisconsin*. (R. 9-19). The conduct complained of in that suit related to picketing activity which had not been the subject of any NLRB charges filed by the petitioners and therefore had not been considered or acted upon by the Board.

The Circuit Court granted a temporary restraining order but on respondents' motion to dismiss the complaint the court vacated the temporary restraining order and dismissed the complaint on the ground that it did not have jurisdiction since the "complaint in this case, at least 'arguably', alleges facts which would be a secondary boycott, which are within the jurisdiction of the National Labor Relations Board." (R. 6).

The Wisconsin Supreme Court unanimously affirmed the decision of the Circuit Court holding that the ruling of *San Diego Building Trades* v. *Garmon*, 359 U. S. 236 (1959) required the state court to decline jurisdiction under the circumstances of this case. The court stated that "since such picketing approaches being unlawful under federal law as a secondary boycott, Wisconsin must decline to enjoin it. On the record before us we can perceive no escape consistent with the *Garmon* decision." 127 N. W. 2d 393, 399.

I

The decision below is clearly correct.

A. No Charge Was Filed With the NLRB and No Determination Was Ever Made by the NLRB Regarding the Legality of the Picketing Activity in Superior, Wisconsin; Such Picketing Was Arguably Subject to Section 8(b)(4) of the Act and the State Court Was Without Power to Enjoin Such Conduct

Since the Wisconsin Supreme Court decided that the rule in the *Garmon* case required that the state decline jurisdiction over the peaceful picketing activity involved herein, it did not find it necessary to discuss the "difference between the conduct now alleged and the conduct complained of in Duluth, Minnesota," although the court thought that it "may well be of significance" and that the two activities "must at least differ in detail, if not in relevant substance." 127 N. W. 2d 393, 398-399.

The picketing activity which is the subject of the state court action occurred in Superior, Wisconsin. (R. 73). The situs of the picketing which was the subject of petitioners' charge of illegal secondary activity was Duluth, Minnesota. (R. 79-80). The action of the Regional Director, sustained by the General Counsel, in refusing to issue a complaint on the 8(b)(4) charge, as well as on the 8(b)(7) charge, related to the *Duluth* picketing. Thus the *Superior* picket-

ing was never passed upon by the Regional Director or the General Counsel and was therefore still arguably subject to Section 8(b)(4) of the Act when petitioners commenced their state court action to enjoin such activity.

B. Assuming That the Charges Filed With the NLRB Covered the Picketing in Superior, Wisconsin, the State Court Had No Jurisdiction to Enjoin Peaceful Picketing Which Arguably Constituted a Secondary Boycott Subject to NLRB Jurisdiction, Since the NLRB Had Refused to Issue a Complaint Thereon Solely Because of Insufficient Evidence

The General Counsel of the NLRB refused to issue a complaint on petitioners' charge that the picketing constituted secondary boycott activity in violation of Section 8(b)(4) of the National Labor Relations Act. The stated basis for the General Counsel's ruling was that there was insufficient evidence to establish a violation of 8(b)(4).[2] The action of the General Counsel constituted a recognition and assumption rather than a denial of NLRB jurisdiction.

In *Graybar Electric Co.* v. *Automotive Industries Employees,* 365 Mo. 753, 770, 287 S. W. 2d 794 (1956), the Supreme Court of Missouri stated:

> "* * * The Regional Director 'made an investigation' of the charges filed by plaintiff and refused to issue a complaint. Thereafter, on appeal to the General Counsel, he found that 'there is insufficient evidence to warrant further proceedings' * * * Such a finding in and of itself precludes any legitimate contention that the Board declined to accept jurisdiction of the controversy. Rather does it definitely re-

[2] Petitioners do not appear to challenge and the record in fact affirmatively establishes (R. 65) that the respondent Union was a "labor organization" within the meaning of the National Labor Relations Act and therefore accountable under the Act for activity which would violate the Section 8(b)(4) proscription against secondary boycotts. *Marine Engineers Beneficial Ass'n* v. *Interlake S.S. Co.,* 370 U. S. 173 (1962).

> flect that the Board did exercise its jurisdiction, did consider the evidence, and did decide that the evidence did not warrant further action."

See also:

> *Mississippi Valley Electric Co.* v. *Teamsters,* 229 La. 37, 85 So. 2d 22 (1955);
> *Wilmot* v. *Frank,* 19 App. Div. 2d 542 (N. Y. 1963).

The requirements of federal labor policy thus left the Union free to engage in the peaceful picketing activity complained of and the state court had no power to enjoin such picketing. The assumption of jurisdiction by the Board deprived the Wisconsin courts of jurisdiction over the same picketing activity. This foreclosure of state action is not altered by characterization of the picketing in the state court as "organization and recognition" rather than "secondary." "It is not the label affixed to the cause of action that controls the determination of the relationship between state and federal jurisdiction." *Local 100 United Ass'n of Journeymen* v. *Borden,* 373 U. S. 690, 698 (1963).

Nor is the foreclosure of state action altered by the fact that petitioners had also filed a charge with the NLRB alleging that the picketing was illegal organization picketing in violation of Section 8(b)(7) of the Act and the Board refused to issue a complaint on that charge because the engineers involved in the dispute were supervisors. The failure of the Board to assume jurisdiction over the activity for purposes of 8(b)(7) did not leave the state free to regulate activity which it is precluded from regulating because of the Board's assumption of jurisdiction under 8(b)(4). *San Diego Building Trades* v. *Garmon, supra; Guss* v. *Utah Labor Relations Board,* 353 U. S. 1 (1956).

As this Court stated in *Garner* v. *Teamsters,* 346 U. S. 485, 500 (1953): "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare

picketing free for purposes or by methods which the federal Act prohibits." [3]

We do not read the Wisconsin Supreme Court's decision as do the petitioners, that its holding is based on whether a ruling of the General Counsel sustaining a Regional Director's refusal to issue a complaint is "final" or not "final" in the sense of appealability. The statement of the Wisconsin Court that petitioners did not "properly accord final legal significance to the acts of the General Counsel" was in reference to the fact that under the circumstances the rulings of the General Counsel did "not define the nature of the activity with unclouded legal significance" under the *Garmon* doctrine.

As this Court said in the *Garmon* case a state may not act where the NLRB by its action failed "to determine the status of the disputed conduct * * * by the refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance." *San Diego Building Trades* v. *Garmon*, 359 U. S. 236, 245.

In any event, as has already been noted above, the action of the General Counsel in declining to issue a complaint under 8(b)(4) solely because of the insufficiency of evidence, constituted an affirmative assumption of jurisdiction by the NLRB and precluded the state from acting with respect to the same activity.

---

[3] In *Local 20, Teamsters Union* v. *Morton*, 377 U. S. 252 (1964), this Court stated:

> "If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted Section 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." (at 259).

If the result of the Board's assumption of jurisdiction and its failure to issue a complaint on a charge of violation of Section 8(b)(4) because of insufficient evidence and its failure to assume jurisdiction for purposes of Section 8(b)(7) of the Act in regard to the same activity appear to leave the petitioners without a remedy to enjoin activity which may be subject to one section of the Act but not to another, the solution cannot be found in judicial rewriting of the Act but must be left to Congress. *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1 (1956).

II

There is no conflict of decision.

Petitioners point to no decision, state or federal, which conflicts with the holding of the Wisconsin Supreme Court. Indeed, the decision below is completely in accord with the decisions of this Court on the subject of federal preemption in this field of labor relations. *Local 20, Teamsters* v. *Morton, supra; San Diego Building Trades* v. *Garmon*, 359 U. S. 236 (1959); *Garner* v. *Teamsters, supra; Guss* v. *Utah Labor Relations Board, supra.*

If the Wisconsin Supreme Court had held otherwise, *i.e.*, if it had held that the state had jurisdiction to enjoin the peaceful picketing involved herein such a decision would have been in direct conflict with the above cited cases and would have raised important questions of federal law which would have necessitated resolution by this Court.

The decision of the Wisconsin Supreme Court supports the doctrine of exclusive NLRB jurisdiction of "activities that are potentially subject to federal regulation" and eliminates the danger of "conflict with national labor policy." *San Diego Building Trades* v. *Garmon, supra.*

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

LEE PRESSMAN,
DAVID SCRIBNER,
50 Broadway,
New York, N. Y. 10004,
Counsel for Respondents.

JOAN STERN KIOK,
of Counsel.

FILED
OCT 21 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

No. [redacted] 7

OCTOBER TERM, 1964.

THE HANNA MINING COMPANY,
NATIONAL STEEL CORPORATION,
HANSAND STEAMSHIP CORPORATION, and
THE HANNA FURNACE CORPORATION,

Petitioners,

vs.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, an unincorporated association,
RAYMOND T. McKAY, its President,
MELVIN H. PELFREY, Secretary-Treasurer,
CHARLES E. LaPORTE, Vice President,
FRANK LECKIE, Field Representative, and
JOHN DOE AND RICHARD ROE, and other individuals whose names are unknown, pickets at Great Northern Railway Company Ore Docks, Superior, Wisconsin,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

JOINT BRIEF OF COLUMBIA TRANSPORTATION DIVISION OF OGLEBAY NORTON COMPANY AND INTERLAKE STEAMSHIP COMPANY, AMICI CURIAE.

JAMES P. GARNER,
ALBERT J. WILLIAMS,
RAYMOND T. JACKSON,
1956 Union Commerce Building,
Cleveland, Ohio 44114,

Counsel for Columbia Transportation Division of Oglebay Norton Company and Interlake Steamship Company, Amici Curiae.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-5647

TABLE OF CONTENTS.

The Respective Interests of Columbia and Interlake 2

Argument ---------- 5

Conclusion ---------- 8

Appendix. Detailed Descriptions of the Various Proceedings Initiated Before, or Filed With, the NLRB by Columbia Against MEBA ---------- A-1

Cases.

MEBA v. Interlaks Steamship Company, 370 U. S. 173 (1962) ---------- 3, 4, 5, 6

Mark Nolan, Presiding Judge, etc., et al., 138 NLRB 576 ---------- 4

Ohio Power Co. v. NLRB (6th Cir.), 176 F. 2d 385, 387-8, cert. den. 338 U. S. 899 ---------- 5

San Diego Building Trades v. Garmon, 359 U. S. 236 - 4, 6

Statutes.

National Labor Relations Act, as Amended, 29 U. S. C. A. Section 151 et seq.

Section 2(3), 29 U. S. C. A. Section 152(3) ---- 3

Section 2(11), 29 U. S. C. A. Section 152(11) ---------- 2, 3, 5

Section 8(b)(4)(B), 29 U. S. C. A. Section 158 (b)(4)(B) ---------- 3, A-1, A-2, A-4

Section 8(b)(7)(C), 29 U. S. C. A. Section 158 (b)(7)(C) ---------- 3, A-1, A-2, A-4

Other Authorities.

Rules of the Supreme Court of the United States, Rule 42, Paragraph 1 2

Sen. Rep. No. 105, 80th Cong., 1st Sess., pp. 5, 28 ... 5

House Rep. No. 245, 80th Cong., 1st Sess., pp. 13, 17 5

Statement of Manager of Bill on Floor of Senate, 93 Cong., Rec. 3836 5

In the Supreme Court of the United States

No. 527.

OCTOBER TERM, 1964.

THE HANNA MINING COMPANY,
NATIONAL STEEL CORPORATION,
HANSAND STEAMSHIP CORPORATION, and
THE HANNA FURNACE CORPORATION,

Petitioners,

vs.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, an unincorporated association, RAYMOND T. McKAY, its President, MELVIN H. PELFREY, Secretary-Treasurer, CHARLES E. LaPORTE, Vice President, FRANK LECKIE, Field Representative, and JOHN DOE AND RICHARD ROE, and other individuals whose names are unknown, pickets at Great Northern Railway Company Ore Docks, Superior, Wisconsin,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

JOINT BRIEF OF COLUMBIA TRANSPORTATION DIVISION OF OGLEBAY NORTON COMPANY AND INTERLAKE STEAMSHIP COMPANY, AMICI CURIAE.

Columbia Transportation Division of Oglebay Norton Company (hereinafter called "Columbia") and Interlake Steamship Company (hereinafter called "Interlake") have severally obtained and filed with the Clerk of this Court the written consents of all Petitioners and all Re-

spondents in the above-entitled action to file this Brief as *Amici Curiae*. Rule 42, Paragraph 1 of the Rules of the Supreme Court of the United States.

THE RESPECTIVE INTERESTS OF COLUMBIA AND INTERLAKE.

1. Like the Petitioners in No. 527, *supra*, Columbia and Interlake severally own and operate[1] fleets of large cargo ships which transport iron ore, coal and other bulk commodities in interstate and foreign commerce on the Great Lakes. In order to operate its fleet each *amicus* necessarily employs several engineers on each of its ships, all of whom are supervisory employees as that term is defined in the National Labor Relations Act, Section 2(11), 29 U. S. C. A. Section 152(11).

2. During the 1964 shipping season on the Great Lakes, Columbia's ships have been periodically subjected to picketing by Marine Engineers Beneficial Association (hereinafter called "MEBA") similar to the picketing of Petitioners' ships involved in the pending case, that is, picketing to coerce (1) the engineers employed on Columbia's ships to join MEBA, (2) Columbia to require its engineers to join MEBA as a condition of continued employment, and (3) Columbia to recognize MEBA as the collective bargaining agent for its engineers. During the picketing, all engineers of Columbia continued to work for Columbia and refused to honor the picket line of MEBA. Columbia had filed a Representation Petition with the Regional Office in Cleveland of the National Labor Relations Board (hereinafter referred to as the "NLRB") in June of 1962 stating that MEBA claimed to be the bar-

---

[1] Interlake is the owner of its fleets of cargo ships, but the ships are operated by Pickands Mather & Co.

gaining representative of all licensed officers in the Engineering Department aboard vessels of Columbia. The Regional Office and the Washington Office of the NLRB dismissed the Petition because, after investigation, it appeared that the employees in the proposed units were not employees within the meaning of Section 2(3) of the NLRA, 29 U. S. C. A. ¶ 152(3) but, instead, were supervisors as defined in Section 2(11) of the NLRA, 29 U. S. C. A. ¶ 152(11). During the 1964 shipping season, Columbia had filed unfair labor practice charges against MEBA in the 3rd Region (Buffalo, New York), the 8th Region (Cleveland, Ohio) and the 18th Region (Duluth, Minnesota) alleging violations of Section 8(b)(4)(B) and Section 8(b)(7)(C) of the National Labor Relations Act, 29 U. S. C. A. ¶ 158(b)(4)(B) and 29 U. S. C. A. ¶ 158(b)(7)(C). The Regional Director in each of the three Regions refused to issue a complaint and upon Request for Review with the General Counsel of the NLRB in Washington, the General Counsel sustained the rulings of the Regional Directors.

For a more detailed description of the various proceedings initiated before, or filed with, the NLRB by Columbia against MEBA, see Appendix, *infra*, A-1.

3. In *MEBA v. Interlake Steamship Company*, 370 U. S. 173 (1962), this Court reversed the decision of the Minnesota Court which had enjoined MEBA from picketing Interlake ships to organize the engineers employed upon such ships upon the grounds that such picketing violated the statutes and public policy of Minnesota. The rationale of this Court's decision was that the Minnesota Courts could not exercise their jurisdiction to enforce the statutes and public policy of the State of Minnesota, which regulated labor relations between supervisors and their employees, unless and until the NLRB "had actually de-

termined the underlying issue upon which its jurisdiction depended, i.e., that MEBA was a 'labor organization' for purposes of § 8(b) of the Act" (l.c. 184).

After the foregoing case had been remanded to the District Court of St. Louis County, Minnesota (the Trial Court), the Presiding Judge of that Court (Nolan, P. J.) filed a Petition with the NLRB for an Advisory Opinion to determine the jurisdictional issue which, under the decision of this Court had to be decided by the NLRB before the Minnesota Courts could exercise their jurisdiction to enforce the applicable statutes and public policy of that State. Columbia filed a Motion to Intervene in the Petition for Advisory Opinion filed by Judge Nolan with the NLRB under the Rules and Regulations of the NLRB. The NLRB refused to issue an advisory opinion upon the ground that its Rules for the issuance of advisory opinions do not apply. *Mark Nolan, Presiding Judge, etc. et al.*, 138 NLRB 576.

4. The employment of engineers (all of whom are supervisory employees) on each ship of Columbia and Interlake is indispensable to the carrying on of their respective businesses. As the Supreme Court of Wisconsin has construed and applied the decisions of this Court in *San Diego Building Trades v. Garmon*, 359 U. S. 236 and *MEBA v. Interlake Steamship Company*, 370 U. S. 173, neither Columbia nor Interlake has any remedy whenever MEBA decides to picket their respective ships for the purposes (1) of coercing their supervisory engineers to join MEBA and (2) of coercing Columbia or Interlake (a) to require such engineer employees to join MEBA as a condition of continued employment and (b) to recognize MEBA as the collective bargaining agent for such engineers; and their respective businesses are subject to irreparable loss at the whim and caprice of MEBA. Con-

sequently, Columbia and Interlake respectively have a vital interest in having this intolerable situation authoritatively resolved and corrected by a decision of this Court.

ARGUMENT.

A. In 1947, the Congress amended the National Labor Relations Act (hereinafter called "NLRA") for the express, and explicitly stated, purpose of excluding labor relations between supervisors and their employers from Federal regulations and of restoring this area of labor relations to the several States. Section 2(11), 29 U. S. C. A. ¶152(11); *MEBA v. Interlake Steamship Company*, 370 U. S. 173, 178, fn. 5; *Ohio Power Co. v. NLRB* (6th Cir.), 176 F. 2d 385, 387-8, cert. den. 338 U. S. 899; Sen. Rep. No. 105, 80th Cong., 1st Sess., pp. 5, 28; House Rep. No. 245, 80th Cong., 1st Sess., pp. 13, 17; Statement of Manager of Bill on Floor of Senate, 93 Cong. Rec. 3836. Congress knew that no employer could have "supervisory personnel" unless he also had "supervised employees" and that labor relations with supervised employees would continue to be under the NLRA. Manifestly, Congress in providing that "Nothing herein" shall prohibit supervisors from becoming or remaining a member of a "labor organization," did not intend to nullify its primary and explicit intent to restore the regulation of labor relations between supervisors and their employers to the several States and, *a fortiori*, in cases where employers or a State Court had exhausted every available avenue in attempting to obtain an adjudication by the NLRB. Manifestly, Congress did not intend to create a situation in which labor relations between supervisors and their employers would not be, and could not be, regulated either by the States or by the NLRB.

1. Nevertheless, the Supreme Court of Wisconsin has construed and applied the decisions of this Court in the *Garmon* and *Interlake* cases in such a way as not only to nullify the intent of Congress but to place labor relations between supervisors and their employers outside of all law, State or Federal. The *Garmon* case involved labor relations between non-supervisory employees and their employers and is clearly inapposite to picketing which is directed solely and expressly to organizing supervisory employees. While the *Interlake* case did involve picketing which was directed solely and expressly to organizing supervisory employees, that decision cannot, we believe, be properly construed as holding that, even though an employer has exhausted all available avenues in attempting to obtain an adjudication by the NLRB, State Courts cannot exercise their jurisdiction to enforce the statutes and public policy of their respective States with the result that such activities are subject to no regulation whatever. Yet, under the decision of the Supreme Court of Wisconsin in this case, any labor organization could picket any employer for the purpose of forcing that employer to recognize it as the bargaining representative of the employer's supervisory or even executive personnel and that employer would have to (1) recognize the labor organization as the bargaining agent or (2) suffer irreparable losses caused by the picket lines at the employer's place of business, or (3) go out of business.

B. If the Supreme Court of Wisconsin correctly construed and applied the decision of this Court in *MEBA vs. Interlake Steamship Co., supra,* then we respectfully, but earnestly submit that this Court should grant certiorari to reconsider the *Interlake* decision and correct a disastrous situation which, we are confident, could not have been intended or foreseen by this Court when the *Inter-*

lake decision was rendered. A reconsideration of that decision should include the circumstance that the intent of Congress can be as effectively nullified by imposing conditions precedent to the exercise of State jurisdiction which are so burdensome or time consuming that, as a practical matter, both the right to invoke and the power to exercise State jurisdiction over this area of labor relations is rendered illusory. Keeping in mind that the out-of-pocket expenses of "operating" one large cargo ship is approximately $6,000.00 a day while it rides at anchor immobilized by an unlawful picket line, a holding that State Courts must stay their hand while an employer futilely pursues illusory and non-existent remedies before the NLRB as effectively destroys State regulation and the rights of supervisory employees and their employers under the State statutes as would an explicit refusal by this Court to recognize, or permit the enforcement of, the Congressional intent to restore this area of labor regulations to the several States.

C. Settlement of the foregoing questions by this Court is plainly required by the public interest. Since every business of substantial size must deal with the problem of labor relations with supervisory employees, their importance is obviously nationwide. Indeed, in relation only to the Petitioners, Columbia, Interlake and other similar transportation companies, such questions have a great national importance because the iron and steel segment of the national economy depends in large part upon the transportation of iron ore, limestone and coal and bulk commodities on the Great Lakes.

CONCLUSION.

For the reasons hereinbefore stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JAMES P. GARNER,
ALBERT J. WILLIAMS,
RAYMOND T. JACKSON,
1956 Union Commerce Building,
Cleveland, Ohio 44114,
Counsel for Columbia Transportation Division of Oglebay Norton Company and Interlake Steamship Company, Amici Curiae.

APPENDIX.

OUTLINE OF THE STATUS OF THE REPRESENTATION PETITION AND UNFAIR LABOR PRACTICE CHARGE FILED WITH THE NLRB BY COLUMBIA AGAINST MEBA.

1. On June 14, 1962, Columbia filed a Representation Petition with the NLRB (8th Region, Cleveland, Ohio) stating that MEBA claimed to be the bargaining representative of all licensed officers in the Engineering Department aboard vessels of Columbia. On June 27, 1962, the Regional Director made the following order:

> "As a result of the investigation, it appears that, because the employees in the proposed unit are not employees within the meaning of Section 2(3) of the Act, being employed as supervisors as defined in Section 2(11) of the Act, further proceedings are not warranted at this time. I am, therefore, dismissing the Petition in this matter."

On July 5, 1962, Columbia filed with the NLRB in Washington a Request for Review and asked the Board to return the case to the Regional Board and order of the Regional Director to determine whether or not the Union is a "labor organization" as defined in the NLRB of 1947, as amended, with respect to the relationship between MEBA and Columbia.

On August 6, 1962, the NLRB ruled that the Regional Director's dismissal of the Petition was warranted.

2. On April 20, 1964, Columbia filed an unfair labor practice charge against MEBA alleging violations of Section 8(b)(4)(B) (Case No. 3-CC-277) and Section 8(b)(7)(C) (Case No. 3-CP-76) of the NLRB with the 3rd Region of the NLRB (Buffalo, New York).

On May 7, 1964, the Regional Director of the 3rd Region refused to issue a complaint.

3. On May 4, 1964, Columbia filed an unfair labor practice charge against MEBA alleging violations of Section 8(b)(4)(i)(ii)(B) and (C) (Case No. 8-CC-214) and Section 8(b)(7)(C) (Case No. 8-CP-53) with the 8th Region of the NLRB (Cleveland, Ohio).

On May 28, 1964, the Regional Director refused to issue complaints in both cases.

4. On May 12, 1964, Columbia filed an unfair labor practice charge against MEBA and alleged violations of Section 8(b)(4)(i)(ii)(B) (Case No. 18-CC-152) and Section 8(b)(7)(C) (Case No. 18-CP-39), with the 18th Region of the NLRB (Duluth, Minnesota).

On May 28, 1964, the Regional Director refused to issue complaints in both cases.

5. On June 20, 1964, Columbia filed a Request for Review with the General Counsel of the NLRB in Washington with respect to the decisions of the Regional Directors in the 3rd, 8th and 18th Regions as set forth above. In each of the Requests for Review, Columbia requested the General Counsel to:

(1) Remand these cases to the Regional Director with directions to investigate the status of the organizations involved and determine whether or not they are "labor organizations" within the meaning of the Act and thus subject to the jurisdiction of the Board; or

(2) If the General Counsel refuses to remand these cases, that the General Counsel review the decisions of the Regional Directors and determine whether the organizations charged with violation of the Act are "labor organizations" within the meaning of the Act; or

(3) If the General Counsel finds that MEBA is not a "labor organization" within the meaning of the Act, these cases should be dismissed for that reason alone or if

it is found that MEBA is a "labor organization" within the meaning of the Act, he should review the evidence in these cases and either affirm or reverse the decisions of the Regional Directors; or

(4) If the General Counsel decides that such determination is unnecessary in these cases, that he should review the evidence and either affirm or reverse the decisions of the Regional Directors.

6. On July 29, 1964, the General Counsel of the NLRB in Washington affirmed the decisions of the Regional Directors in all cases. The following is the decision made by the General Counsel:

> "Your appeals from the Regional Directors' refusals to issue complaints in the captioned cases, charging violations under Section 8 of the National Labor Relations Act, have been duly considered.
>
> "This office sustains the rulings of the Regional Directors. It was concluded that, inasmuch as the individuals which MEBA and/or District 2, MEBA, sought to represent were supervisors within the meaning of Section 2(11) of the Act who did not currently have a certified collective bargaining representative, Sections 8(b)(7)(C) and 8(b)(4)(C) were deemed inapplicable to the picketing involved. It was further concluded that, since the picketing conformed to the standards of lawful conduct set forth in *Moore Dry Dock Company*, 92 NLRB 547, and in the absence of any probative evidence that the picketing was actually aimed at achieving objectives over and beyond those incidental effects normally flowing from legitimate primary picketing, insufficient basis existed for an 8(b)(4)(i) and (ii)(B) finding. Cf. *Pure Oil Co.*, 84 NLRB 315; *Interborough News Company*, 90 NLRB 2135; *Milwaukee Plywood Company*, 126 NLRB 650, affd. 285 F. 2d 325 (C. A. 7); and *United Steelworkers of America, AFL v. NLRB*, 376 U. S. 492.

"Accordingly, and since there was no impropriety in the Regions' actions in dismissing these cases on the merits without specifically passing on the issue as to whether District 2 is a labor organization within the meaning of Section 2(5) of the Act (see *Building & Construction Trades Council of Ventura County*, 147 NLRB No. 124, footnote 1), further proceedings herein were deemed unwarranted.

"Very truly yours,

"ARNOLD ORDMAN
"General Counsel

"BY IRVING M. HERMAN
Director, Office of Appeals"

7. On July 17, 1964, Columbia filed an unfair labor practice charge against MEBA alleging violations of Section 8(b)(4)(i)(ii)(B) and (C) (Case No. 7-CC-264) and Section 8(b)(7)(C) (Case No. 7-CP-53) with the Regional Director of the 7th Region of the NLRB (Detroit, Michigan).

On August 18, 1964, the Regional Director refused to issue a complaint in this case on Section 8(b)(7)(C). No action as yet has been taken on the other charge.

8. On September 14, 1964, Columbia filed a Request for Review of the charge under Section 8(b)(7)(C) with the General Counsel of the NLRB in Washington. No action has been taken on this Request by the General Counsel.

COPY

FILED
OCT 30 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 7

THE HANNA MINING COMPANY, NATIONAL STEEL CORPORATION, HANSAND STEAMSHIP CORPORATION, and THE HANNA FURNACE CORPORATION,

Petitioners,

VS.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, an unincorporated association, RAYMOND T. McKAY, its President, MELVIN H. PELFREY, Secretary-Treasurer, CHARLES E. LaPORTE, Vice-President, FRANK LECKIE, Field Representative, and JOHN DOE and RICHARD ROE, and other individuals whose names are unknown, pickets at Great Northern Railway Company Ore Docks, Superior, Wisconsin,

Respondents.

Petition for a Writ of Certiorari

SUPPLEMENTAL BRIEF FOR RESPONDENTS IN OPPOSITION

LEE PRESSMAN,
DAVID SCRIBNER,
50 Broadway,
New York, N. Y. 10004,
Counsel for Respondents.

JOAN STERN KIOK,
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1964

No. 527

THE HANNA MINING COMPANY, NATIONAL STEEL CORPORATION, HANSAND STEAMSHIP CORPORATION, and THE HANNA FURNACE CORPORATION,

Petitioners,

VS.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, an unincorporated association, RAYMOND T. McKAY, its President, MELVIN H. PELFREY, Secretary-Treasurer, CHARLES E. LaPORTE, Vice-President, FRANK LECKIE, Field Representative, and JOHN DOE and RICHARD ROE, and other individuals whose names are unknown, pickets at Great Northern Railway Company Ore Docks, Superior, Wisconsin,

Respondents.

Petition for a Writ of Certiorari

SUPPLEMENTAL BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents respectfully call the Court's attention to *Linn* v. *United Plant Guard Workers of America*, 50 CCH Lab. Cas. ¶ 19,270 decided October 13, 1964 by the Court of Appeals for the Sixth Circuit, reprinted as Appendix "A" hereto.

This decision appears to support respondents' position that the refusal of the Board to issue a complaint on an

unfair labor practice charge because of insufficient evidence precludes a state or federal court from taking jurisdiction to grant relief for the same activity.

Respectfully submitted,

LEE PRESSMAN,
DAVID SCRIBNER,
50 Broadway,
New York, N. Y. 10004,
Counsel for Respondents.

JOAN STERN KIOK,
of Counsel.

Appendix A

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

No. 15548

October 13, 1964

WILLIAM C. LINN,

Plaintiff-Appellant

v.

UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, et al.,

Defendants-Appellees.

On Appeal from United States District Court, Eastern District of Michigan. Affirmed.

Before:

CECIL and O'SULLIVAN, Circuit Judges, and MILLER, District Judge.

O'SULLIVAN, C. J.: This appeal presents the question whether the National Labor Relations Board has preempted the diversity jurisdiction of a district court to entertain an action to recover damages for libel committed by a union and its officers in the course of, and arising out of tactics employed in a union's organization campaign. The District Court so held in dismissing, on motion, such an action commenced by a management official against a union and its officers. On the authority of *San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 326 (1959), and the Supreme Court's decisions following *Garmon*, we affirm.

Plaintiff-appellant, William C. Linn, was at the time involved in 1962 an assistant general manager for the North Central Region of Pinkerton's National Detective Agency, Inc. The complaint charged that during a campaign to organize Pinkerton's employees, defendant-appellee, United Plant Guard Workers of America, Local 114, and defendants-appellees, Benton I. Bilbrey, President of the union local and W. T. England, its Vice-President, and one Leo J. Doyle, a Pinkerton guard, conspired to and did utter, publish, circulate and mail written matter maliciously libelling and defaming plaintiff Linn. For consideration of the question before us we accept that these statements were false, malicious, clearly libelous and damaging to plaintiff Linn, albeit they were relevant to the union's campaign.

Linn's employer filed an unfair labor practice charge against the union based upon the libelous material, but the Board's Acting Regional Director refused to issue a complaint upon his determination that "there is no evidence that the union was involved in any respect in the drafting and circulation of the leaflets." This refusal was affirmed by the NLRB Office of Appeals on February 13, 1963. On June 5, 1963, the District Judge filed a memorandum opinion supporting his order of dismissal stating:

> "If Local 114 or its President or Vice-President were in fact responsible for distributing to Pinkerton's employees a false and defamatory publication which would tend to affect adversely the relations between Pinkerton's and its employees, this would arguably constitute an unfair labor practice under Section 8(b) of the National Labor Relations Act. * * *"

and from this reasoned that the District Court was "without authority to give plaintiffs any relief against the moving

defendants" (the union and its officers) under the now familiar language of *Garmon*:

> "when an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U. S. 245.

The *Garmon* decision appears to have been accepted as setting at rest the uncertainties that had remained as to just what traditional remedies could still be employed in the state courts to redress wrongs committed in the collisions between employers and employees' unions. It has been assumed that since *Garmon* the states can intrude into this field only when some "compelling state interest" such as "the maintenance of domestic peace" called for exercise of a state's traditional remedies. And it likewise is assumed that only violence or the threat of violence will permit a state court to act. The considerations urged to sustain judicial jurisdiction in the present case were tentatively reflected in pre-*Garmon* decisions of the Supreme Court, and after full consideration were limited to the particular circumstances of those decisions by *Garmon* and subsequent decisions. Thus in *United Automobile Workers v. Russell*, 356 U. S. 634 (1958), and *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U. S. 656, 98 L. Ed 1025 (1954), the Supreme Court affirmed state court judgments for damages inflicted by the tortious conduct of labor unions committed as part of their organizational efforts. While each of these cases involved violence or threats of violence, neither of them relied on *violence* as the essential ingredient of permissible state action. Rather, it appeared that state jurisdiction was sustained because of the inadequacy of the National Labor Relations Act as a means of compensating for damaging torts. The opening

paragraph of *Laburnum* announced the breadth of its holding.

> "The question before us is whether the Labor Management Relations Act, 1947, has given the National Labor Relations Board such exclusive jurisdiction over the subject matter of a *common-law tort action for damages* as to preclude an appropriate state court from hearing and determining its issues where such conduct constitutes an unfair labor practice under that Act. *For the reasons hereafter stated, we hold that it has not.* 347 U. S. 657, 98 L. Ed. 1027. (Emphasis supplied.)

Laburnum further expressed the view that "to the extent * * * that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, [as distinguished from preventive procedure], there is no ground for concluding that existing * * * *liabilities for tortious conduct have been eliminated.*" 347 U. S. 665, 98 L. Ed. 1031. (Emphasis supplied.) The Supreme Court also there took occasion to distinguish between its holding of Federal preemption in *Garner v. Teamsters Local 776,* 346 U. S. 485, 98 L. Ed. 228 (1953) and its approval of state jurisdiction in the *Laburnum* case then before it, saying that,

> "In the *Garner* case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. *For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation.* 347 U. S. 663-64, 98 L. Ed. 1031. (Emphasis supplied.)

The decision in *United Automobile Workers v. Russell*, 356 U. S. 634 (1958) appeared to express the same concern for retaining a state's right to redress damages inflicted on its citizens by tortious misconduct committed during the course of labor strife. As in *Laburnum*, the tortious conduct contained a *threat* of violence, since "the [picket] line consisted of persons standing along the street or walking in a compact circle across the entire traveled portion of the street. Such pickets, on July 18, by force of numbers, threats of bodily harm to Russell and of damage to his property, prevented him from reaching the plant gates. At least one striker took hold of Russell's automobile." While mentioning the threat of violence, it does not appear that *violence* was the sole reason for allowing Russell to recover damages for tortious interference with his means of earning a livelihood. Rather, the Court seemed to emphasize the lack of power in the NLRB to grant adequate relief. It said, "this section [§ 10(c) of the Act] is far from being an express grant of exclusive jurisdiction superseding common-law actions, by either an employer or an employee, to recover damages caused by the tortious conduct of a union. * * * We conclude that an employee's right to recover, in the state courts, *all* damages caused him by this kind of tortious conduct cannot fairly be said to be pre-empted without a clearer declaration of congressional policy than we find here." 356 U. S. 642, 646.

Without any intervening relevant amendment to the National Labor Relations Act, however, the Court in *Garmon* limited the application of *Laburnum* and *Russell* to torts involving violence.

> "It is true that we [in *Laburnum* and *Russell*] have allowed the States to grant compensation for the consequences as defined by the traditional law of torts, of conduct marked by *violence and imminent threats to the public order.* * * * State jurisdiction has prevailed in these situations because the *compelling state interest*, in the scheme of our federalism,

> *in the maintenance of domestic peace* is not overridden in the absence of clearly expressed congressional direction. We recognize that the opinion in *United Construction Workers v. Laburnum Corp.*, 347 U. S. 656, found support in the fact that the state remedy had no federal counterpart. But that decision was determined, as is demonstrated by the question to which review was restricted, by the 'type of conduct' involved, *i.e.*, 'intimidation and threats of violence.' In the present case there is no such compelling state interest." 359 U. S. 247-48. (Emphasis supplied.)

The plaintiff here argues that we should recognize as a "compelling state interest" the protection of an individual's good name and reputation and thus come within the one exception to the preemptive rule of *Garmon*. It is indeed clear that physical assault and battery and libelous assault upon a citizen's good name are both torts that cannot be compensated by a "cease and desist" order of the NLRB. An individual might quickly recover from the bruises and wounds of a physical assault and at little expense have a crumpled fender bumped out, but a lifetime may not be sufficient to restore a reputation hurt by the circulation of a vicious libel. We are persuaded, however, that *Garmon* has drawn the distinction which permits the one to be remedied by traditional court action and limits the other to the relief, if any, that may come from an order of the NLRB. And if a Regional Director's refusal to issue a complaint is sustained by the Board's General Counsel as happened to the company's charge in this case, the libelled individual is at the end of the remedial road. Compare *Dunn v. Retail Clerks Internat'l Ass'n*, 307 F. (2d) 285 (CA-6, 1962).

Our conclusion that *Garmon* has foreclosed plaintiff's entry into the courts is supported by the later decisions in *Local 100, United Ass'n of Journeymen & Apprentices*

v. Borden, 373 U. S. 690 (1963) and *Local 207, Internat'l Ass'n of Bridge Workers v. Perko*, 373 U. S. 701 (1963) wherein, in obedience to *Garmon*, state courts were denied jurisdiction to entertain actions by workmen for intentional and tortious interference by a union with their means of earning a livelihood. Such interference involved no *physical violence* and therefore the one exception recognized in *Garmon* was absent. We think that there would be as "compelling" a state interest to protect the workman's right to earn his wages as to protect his employer's good name, but such an interest was found insufficient justification for state jurisdiction in *Borden* and *Perko*.

Such courts as have had occasion since *Garmon* to consider the question of federal preemption of libel suits arising out of union organizational activity have concluded that state jurisdiction does not exist. *Hill v. Moe*, 367 P. (2d) 739 (Alaska 1961), *cert. denied*, 370 U. S. 916 (1962); *Blum v. International Ass'n of Machinists*, 42 N. J. 389, 201 A. (2d) 46 (1964); *Schnell Tool & Die Corp. v. Steel Workers*, 32 U. S. L. Week 2534 (Ohio Com. Pl March 13, 1964). The only expression of a contrary view is found in the opinion of the three dissenters in *Blum v. Internat'l Ass'n of Machinists, AFL-CIO, supra*. We are satisfied that under *Garmon* these dissenters were wrong. We respect their dissent, however, as an understandable cry of anguish.

Our holding in this case is of course limited to a suit for libelous statements growing out of and relevant to a union's campaign to organize the employees of an employer subject to the National Labor Relations Act. We mention too that it is not necessary for us to inquire whether the individual defendant, Doyle, a Pinkerton employee, could have obtained dismissal by appropriate motion. He did not so move.

Judgment affirmed.

INDEX

	Page
Statement	1
Discussion	6
Conclusion	15
Appendix	16

CITATIONS

Cases:	
Alabama Marble Co., 83 NLRB 1047	9
Garner v. *Teamsters Union*, 346 U.S. 485	7
Incres Steamship Co. v. *International Maritime Workers Union*, 372 U.S. 24	15
Jackson Electric Membership Corp., 106 NLRB 1019	9
Leonard Niederriter Co., 130 NLRB 113	9
Local 761, Electrical Workers v. *National Labor Relations Board*, 366 U.S. 667	7
Marine Engineers Beneficial Association v. *Interlake Steamship Co.*, 370 U.S. 173	5, 6, 9
Modern Cleaners Co., 100 NLRB 37	9
Moore Dry Dock, 92 NLRB 547	3, 12
National Labor Relations Board v. *Budd Mfg. Co.*, 169 F. 2d 571, certiorari denied, 335 U.S. 908	9
Panaderia Sucesion Alonso, 87 NLRB 877	9
Pure Oil Co., 84 NLRB 315	3
San Diego Trades Council v. *Garmon*, 359 U.S. 236	5, 6, 7, 11, 12
Teamsters v. *Morton*, 377 U.S. 252	9, 10
Teamsters v. *Vogt*, 354 U.S. 284	4
United Steelworkers v. *National Labor Relations Board*, 376 U.S. 492	7
Youngdahl v. *Rainfair*, 355 U.S. 131	14

Statute:
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., 151, *et seq.*):
Page
Section 2(3) 3, 8, 16
Section 2(11) 3, 8, 11, 16
Section 3(d) 7
Section 7 ..... 7, 8, 14, 17
Section 8(b)(4) 3, 5, 7, 8, 12, 13, 14, 17
Section 8(b)(7) 4, 5, 7, 8, 9, 11, 14, 18
Section 10(b) 7
Section 14(a) 9, 10, 19
Miscellaneous:
S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 5, 1 Leg. Hist. LMRA (1947) 411 9

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 527

THE HANNA MINING COMPANY, ET AL., PETITIONERS

v.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL–CIO, AN UNINCORPORATED ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

MEMORANDUM FOR THE UNITED STATES

STATEMENT

By order of the Court, dated December 14, 1964, the Solicitor General was invited to express the views of the United States with respect to this case. The facts are stated in the petition for certiorari and in the opinion of the Supreme Court of Wisconsin (Pet. 4–10, 29–33), and may be summarized as follows:[1]

Petitioner Hanna Mining Company ("Hanna") owns and operates a number of ships which transport cargo on the Great Lakes. Hanna had a collective bargaining agreement with respondent District 2,

[1] References to the Transcript of Record, printed as an appendix to petitioners' brief in the court below, are designated "R."

Marine Engineers Beneficial Association ("MEBA") covering the licensed marine engineers employed aboard Hanna's vessels. The contract terminated in July 1962, and Hanna and MEBA entered into negotiations for a new contract. During these negotiations, a majority of Hanna's engineers informed Hanna that they no longer wished to be represented by MEBA. Thereupon, Hanna declined to negotiate further with MEBA until the question of representation was resolved by a secret ballot election (Pet. 4–5).

On September 12, 1962, MEBA began picketing Hanna's ship, *S.S. Joseph H. Thompson*, which was then being unloaded at Duluth, Minnesota.[2] The picketing resulted in a refusal by dock workers to continue unloading operations, and the ship left Duluth on September 28 with her cargo still unloaded. MEBA also engaged in picketing of Hanna ships at various other ports of the Great Lakes, including Superior, Wisconsin (Pet. 5–6).

The same day the MEBA picketing began, Hanna filed a representation petition with the Regional Director of the National Labor Relations Board, requesting that an election be held among Hanna's engineers to determine whether or not they wished continued rep-

[2] The signs read (Pet. 6):

HANNA MINING UNFAIR
TO
MARINE ENGINEERS
BENEFICIAL ASSOCIATION
REFUSES TO NEGOTIATE
CONTRACT
AFL–CIO
NO DISPUTE WITH ANY
OTHER EMPLOYER
S. S. JOSEPH THOMPSON

resentation by MEBA. The Regional Director dismissed the petition on the ground that the persons in the proposed unit were not "employees" within the meaning of Section 2(3) of the National Labor Relations Act, but were "supervisors" as defined in Section 2(11) (see p. 16, *infra*.). Hanna's request for review was denied by the Board on the same grounds (Pet. 6–7; R. 86–87, 46–47).

On September 15, 1962, Hanna filed charges with the Regional Director, alleging that MEBA had violated Section 8(b)(4)(B) of the Act (p. 17, *infra*) by inducing and encouraging work stoppages among employees of employers other than Hanna at the docks in Duluth. The Regional Director dismissed these charges, and the General Counsel of the Board sustained the dismissal on the ground that the evidence did not show a secondary object proscribed by Section 8(b)(4)(B). The General Counsel pointed out that the picketing conformed to the standards for primary picketing established by the Board in the *Moore Dry Dock* case,[3] and that the oral appeals to neutral employees were likewise primary since they were limited to inducing those employees to cease performing work aboard Hanna's ship.[4] The General Counsel added that MEBA's activity at other sites did not evince an unlawful secondary object, inconsistent with the primary object of the picketing in Duluth (Pet. 6–7; R. 48–51).

On September 27, 1962, Hanna filed with the Regional Director charges alleging that MEBA's

[3] 92 NLRB 547.

[4] See *Pure Oil Co.*, 84 NLRB 315.

picketing had an organizational or recognitional objective and was barred under Section 8(b)(7) of the Act (p. 17, *infra*). The Regional Director refused to issue a complaint, and his ruling was sustained by the General Counsel on the ground that "the supervisory status of the licensed engineers precluded a finding that the Union's picketing and other activity was for an object proscribed by Section 8(b)(7) of the Act * * *" (Pet. 8; R. 55–56).

MEBA continued its picketing of Hanna ships until the close of the Great Lakes navigation season in December 1962. In May 1963, when the Lakes became navigable again and Hanna ships appeared in the harbor at Superior, Wisconsin, MEBA resumed its picketing (Pet. 9).

On June 24, 1963, Hanna filed a complaint in the Circuit Court for Douglas County, Wisconsin, seeking an injunction against the picketing at Superior. The complaint and the supporting affidavits alleged that MEBA was picketing Hanna's vessels at the ore loading docks of the Great Northern Railway Company at Superior, with signs similar to those used in the 1962 picketing; that the objective of the picketing was the same as that of the earlier picketing, *i.e.*, to compel Hanna to recognize MEBA, and to compel its engineers to become members of that union, even though those employees did not desire MEBA as their representative; that such objective was unlawful under Wisconsin law;[5] and that the Board had previously determined that the engineers were supervisors to whom the National Labor Relations Act did not

[5] See *Teamsters* v. *Vogt*, 354 U.S. 284.

apply. It was further alleged that the picketing was causing work stoppages among individuals employed by employers other than Hanna (Pet. 9; R. 68–79, 56–64). The complaint requested an order enjoining MEBA, *inter alia,* from picketing the vessels of Hanna or the docks where they were located, and from seeking to compel Hanna to employ only members of MEBA or to force its employees to become and remain members of MEBA (R. 78). The Circuit Court, on motion of MEBA, dismissed the complaint for lack of jurisdiction over the subject matter, and the Supreme Court of Wisconsin affirmed (Pet. 41–45, 29–40).

The Supreme Court of Wisconsin concluded that MEBA's picketing, as described in the complaint and supporting affidavits, arguably violated Sections 8(b)(4)(B) and (7) of the National Labor Relations Act, and thus, under this Court's decisions in *Garmon*[6] and *Interlake,*[7] State regulation was barred, at least until the Board had determined this issue. Nor was it relevant, in the view of the Wisconsin court, that the General Counsel had declined to issue a complaint with respect to MEBA's picketing; for only a decision by the Board was sufficient to resolve the status of disputed conduct under the NLRA.[8] The

[6] *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236.

[7] *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173.

[8] In so holding, the Wisconsin court relied on the following passage from *Garmon*, *supra* (359 U.S. at 245–246):

> To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. * * * [T]he

court also noted that the picketing which was the basis for Hanna's State court suit took place at Superior, Wisconsin in June 1963, while the picketing dealt with by the General Counsel of the Board took place at Duluth, Minnesota, in September 1962 (Pet. 34-40).

DISCUSSION

In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245, this Court held that, when "an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." And, in *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173, the Court specifically applied this principle to the picketing activities of MEBA, the labor organization here.* A Board determination of whether activity is prohibited by the NLRA ordi-

---

Board may * * * fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. * * *

*However, in *Interlake*, unlike here, there had been no effort to present the underlying activity to the Board or the General Counsel, *before* instituting the State court action.

narily may be obtained by filing an unfair labor practice charge with the General Counsel of the Board. If the General Counsel finds reasonable cause to believe that an unfair labor practice has been committed, he will issue a complaint[10] and the matter will ultimately go before the Board for decision. If, on the other hand, he finds no reason to believe that an unfair labor practice has been committed, he will decline to issue a complaint and the matter will never reach the Board. In the usual case, the General Counsel's refusal to issue a complaint does not "define the nature of the activity with unclouded legal significance" (*Garmon*, 359 U.S. at 246), and hence does not permit the States to step in.

The Act, for example, prohibits peaceful picketing when it is conducted for the secondary objectives proscribed by Section 8(b)(4)(B), and limits picketing, even though it is directed only at the primary employer, when it is conducted for recognitional or organizational purposes (Section 8(b)(7)).[11] In general, peaceful picketing otherwise falls either within the specific protection of Section 7 of the Act or within the area which Congress has designedly left to the free play of economic forces.[12] In these circumstances, it is apparent that, should the General Coun-

[10] See Sections 10(b) and 3(d) of the Act (29 U.S.C. 160(b), 153(d)).

[11] These provisions are set forth pp. 17–18, *infra*. For the distinction between primary and secondary picketing, see *Local 761, Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667; *United Steelworkers* v. *National Labor Relations Board*, 376 U.S. 492.

[12] See *Garner* v. *Teamsters Union*, 346 U.S. 485, 499–500; *Teamsters* v. *Morton*, 377 U.S. 252, 259–260.

762-992—65——2

sel refuse to issue a complaint on charges alleging that picketing was being conducted in violation of Section 8(b)(4)(B) or Section 8(b)(7), this would normally not be sufficient to establish that the activity was removed from the preemptive effect of the Act. Such refusal would merely indicate that there was insufficient evidence to bring the picketing within one of the Act's prohibitory bans; it would not negate the possibility that the picketing was affirmatively protected by Section 7 or designedly left free.

The Wisconsin courts, applying these principles, concluded that the Board had not defined "with unclouded legal significance" the nature of MEBA's picketing of the Hanna vessels, and that the State courts were therefore without power to regulate such activity. We submit that, in the special circumstances of this case, the Board definitively has determined that, insofar as MEBA's picketing of the vessels was primary, it is outside the ambit of the NLRA. The Wisconsin courts thus were empowered to enjoin the picketing to that extent.

1. It is clear that efforts to organize persons who are "supervisors," rather than "employees," are not protected by the NLRA. Section 7 of the Act, which protects the right to self-organization, is limited to "employees," and, by the 1947 amendments to the NLRA, Congress removed "supervisors" from the category of "employees".[13] Its purpose in doing so was to "relieve employers who are subject to the national act free from any compulsion by this National Board or any local agency to accord to the front line

[13] See Sections 2(3) and 2(11) of the Act, p. 16, *infra*.

of management the anomalous status of employees." S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 5, 1 Leg. Hist. LMRA (1947) 411; see *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. at 178, n. 5. This is made manifest in Section 14(a) of the Act (p. 18, *infra*), which provides that, although supervisors are free to join unions, "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." Congress having sought to leave employers free from federal, as well as State, compulsion to recognize and bargain with a union representing supervisors, efforts by a union to compel such recognition and bargaining are not protected by the National Labor Relations Act.[14]

It is equally clear that primary picketing for the purpose of forcing an employer to bargain with a labor organization as the representative of supervisory personnel, or forcing supervisory personnel to accept that labor organization as their collective bargaining representative—the alleged objects of MEBA's picketing here—is not prohibited by the NLRA, not even "arguably" so. Section 8(b)(7) (p. 17, *infra*), the provision regulating picketing for organizational or recognitional purposes, explicitly applies only to picketing directed at "employees."

---

[14] See *National Labor Relations Board* v. *Budd Mfg. Co.*, 169 F. 2d 571 (C.A. 6), certiorari denied, 335 U.S. 908; *Alabama Marble Co.*, 88 NLRB 1047, 1049, 1074; *Modern Cleaners Co.*, 100 NLRB 37, 38–39; *Jackson Electric Membership Corp.*, 106 NLRB 1019; *Leonard Niederriter Co.*, 130 NLRB 113; cf. *Panaderia Sucesion Alonso*, 87 NLRB 877, 880–883.

Finally, there is nothing in the history or policies of the NLRA which suggests that Congress, although neither protecting nor prohibiting organizational picketing directed at supervisors, intended such picketing to be beyond the reach of the States. Cf. *Teamsters* v. *Morton*, 377 U.S. 252, 259–260. The evil of organizational picketing—*i.e.*, that it tends to coerce the persons involved to join, and the employer to recognize, the picketing union—is precisely the same whether the picketing is directed at supervisory personnel or at employees. Accordingly, the failure of Congress to prohibit such picketing when directed at supervisors can only be explained on the ground that the NLRA does not, as a general matter, deal with organizational activity among supervisors—it does not show that Congress intended to leave the subject unregulated by other means. Nor does Section 14(a) of the Act compel a contrary conclusion. That section prohibits a State from imposing on an employer the duty to recognize a union of supervisors; it does not preclude a State from protecting an employer from union pressure designed to force such recognition. Indeed, to read the latter prohibition into Section 14(a) would defeat its very purpose to insure the freedom of employers not to recognize a union representing supervisors.

2. In this case, there has been a definitive adjudication by the Board that Hanna's engineers were supervisors under the NLRA. In September 1962, when MEBA's picketing first began, Hanna filed a representation petition with the Board's Regional Director requesting that an election be held among its engi-

neers, the Regional Director dismissed the petition on the ground that the engineers were supervisors as defined in Section 2(11) of the Act, and the Board denied Hanna's request for review on the same grounds (pp. 2–3, *supra*).

In light of this authoritative ruling by the Board, it followed (see pp. 8–10, *supra*) that the Act was indifferent to bargaining or organizational efforts on behalf of Hanna's engineers. The Act did not compel Hanna to bargain with a union for those engineers, even if the union represented a majority; nor was picketing of Hanna for the purpose of obtaining recognition as the representative of the engineers subject to regulation under Section 8(b)(7). Accordingly, when Hanna, shortly after its representation petition was denied, filed an 8(b)(7) charge with the General Counsel, he properly dismissed it on the ground that, in view of the Board's determination of supervisory status, Section 8(b)(7) was inapplicable to the picketing (pp. 3–4, *supra*).

In these circumstances, irrespective of what may be the result in other cases, the ruling of the Board on the representation petition coupled with the General Counsel's refusal to issue a complaint on the 8(b)(7) charge have determined "with unclouded legal significance" (*Garmon*, 359 U.S. at 246) that the NLRA neither protects MEBA in, nor prohibits it from, engaging in primary picketing of Hanna's vessels for the purpose of compelling Hanna to recognize it as the representative of its engineers. Therefore, there is no valid justification for barring the State from regulating that picketing, if it so chooses.

The contrary conclusion leads to a result which the court below termed a "paradox" (Pet. 40): MEBA's primary picketing—though neither "arguably" protected nor prohibited by the NLRA, and not designedly left unregulated by Congress—is nevertheless free of State restraint, notwithstanding that the activity is allegedly unlawful under State law. Such an anomalous hiatus in the regulation of MEBA's organizational picketing is not compelled by, nor does it serve in any way to further, the principles underlying the *Garmon* preemption doctrine—*i.e.*, the avoidance of potential interference with the policies of the NLRA.

3. Nor is the State deprived of all jurisdiction to regulate MEBA's picketing because it may have "secondary" as well as "primary" aspects.

The picketing of the Hanna ships at Superior, like most ship picketing, occurred at a common situs, *i.e.*, a location where not only Hanna, but also other employers, were engaged in business. Under the Board's *Moore Dry Dock* criteria,[15] picketing at such a situs is secondary and within Section 8(b)(4)(B) if it is directed at the secondary employers and their employees, but it is primary and outside that section if every reasonable effort has been made to confine the picketing to the primary employer's operations. Since the picketing of the Hanna ships appears to have caused the employees of the other employers on the common situs to stop work, a question arises as to whether this was the result of the picketing directed against Hanna, or the result of a deliberate effort to

[15] 92 NLRB 547, 549.

direct the picketing at the secondary employers."[16] And, insofar as the picketing were secondary, the Board would be able to check it under Section 8(b)(4)(B) even though the ultimate object were to secure recognition on behalf of supervisors, for the protection of that section extends to "any person" engaged in commerce (see p. 17, *infra*). Although the General Counsel of the Board found that the 1962 picketing at Duluth was not secondary (p. 3, *supra*), he had no opportunity to evaluate the 1963 picketing at Superior, which forms the basis for the present suit, because Hanna did not file an 8(b)(4)(B) charge with regard to that picketing. Accordingly, the 1963 picketing "arguably" contained some secondary elements which the Board could reach under 8(b)(4)(B). The court below concluded that this possibility—which seems somewhat remote in view of the apparent similarity of the 1962 and the 1963 picketing—was sufficient to deprive the State courts of all jurisdiction in this case. We submit that the court below erred.

In the usual case of common situs picketing, the policies of the NLRA are furthered by excluding all State regulation, at least until the Board has evaluated the activity. For, not only is the line between secondary and primary activity a delicate one, but, to the extent that the activity is found to be primary, it cannot in any event be regulated by the State, for it

[16] Hanna's complaint in this case alleged that the picketing caused work stoppages on the part of neutral employees, but it is not clear whether these were an incident of the primary picketing against Hanna, or due to more deliberate efforts (R. 76–77).

would be protected by Section 7 or limited by Section 8(b)(7). In the instant case, however, it is clear that MEBA's primary picketing, since it seeks to attain recognition on behalf of supervisors who are not protected by the Act, is activity which the State could regulate irrespective of whether the General Counsel of the Board were to find that the picketing also had secondary aspects which the Board could proscribe under Section 8(b)(4)(B). In short, unlike the usual common situs picketing where both the secondary and primary aspects of the picketing are regulated by the NLRA, the picketing here was a hybrid: insofar as it was directed at Hanna alone, it was outside the regulatory sphere of the Act and subject to control by the State; and insofar as it may have been directed at the other employers on the common situs as well, it was secondary and reachable by the Board under Section 8(b)(4)(B). The State, by an injunction limited to MEBA's primary picketing, could reach the part of the picketing which is undeniably within its jurisdiction without at the same time encroaching upon the Board's jurisdiction over the secondary aspects (if any). The fact that the Board may ultimately proceed against the secondary aspects of the picketing consequently affords no valid justification in this case for denying to the State the power to reach that part of the picketing which is clearly within its regulatory sphere. Cf. *Youngdahl* v. *Rainfair,* 355 U.S. 131, which holds that, while the State could not enjoin all the picketing at the plant of an interstate employer, it was free to enjoin acts and threats of violence emanating from the picket line.

And see *Incres Steamship Co.* v. *International Maritime Workers Union*, 372 U.S. 24 (State empowered to enjoin primary picketing of foreign flag ships, for the NLRA does not apply to employees on those ships; since such picketing usually occurs in a common situs situation, it, no less than the picketing here, "arguably" would always have secondary aspects).

CONCLUSION

For the foregoing reasons, we believe that the Supreme Court of Wisconsin erred in holding that the State court lacked jurisdiction to enjoin the picketing in this case insofar as it was directed at the primary employer, Hanna.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

STEPHEN B. GOLDBERG,
Attorney,
National Labor Relations Board.

FEBRUARY 1965.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*) are as follows:

SEC. 2.

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical

nature, but requires the use of independent judgment.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * * * *

SEC. 8(b). It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the

provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employes, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act, (B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any

other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

* * * * *

SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1948

COPY

FILED

MAR 1 1965

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 7

THE HANNA MINING COMPANY, NATIONAL STEEL CORPORATION, HANSAND STEAMSHIP CORPORATION, and THE HANNA FURNACE CORPORATION,

Petitioners,

VS.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATON, AFL-CIO, an unincorporated association, RAYMOND T. MCKAY, its President, MELVIN H. PELFREY, Secretary-Treasurer, CHARLES E. LAPORTE, Vice-President, FRANK LECKIE, Field Representative, and JOHN DOE and RICHARD ROE, and other individuals whose names are unknown, pickets at Great Northern Railway Company Ore Docks, Superior, Wisconsin,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

RESPONSE BY RESPONDENTS TO MEMORANDUM FOR UNITED STATES

LEE PRESSMAN,
DAVID SCRIBNER,
50 Broadway,
New York, N. Y., 10004,
Attorneys for Respondents.

IN THE

Supreme Court of the United States

October Term, 1964

No. 527

THE HANNA MINING COMPANY, NATIONAL STEEL CORPORATION, HANSAND STEAMSHIP CORPORATION, and THE HANNA FURNACE CORPORATION,

Petitioners,

vs.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATON, AFL-CIO, an unincorporated association, RAYMOND T. McKAY, its President, MELVIN H. PELFREY, Secretary-Treasurer, CHARLES E. LaPORTE, Vice-President, FRANK LECKIE, Field Representative, and JOHN DOE and RICHARD ROE, and other individuals whose names are unknown, pickets at Great Northern Railway Company Ore Docks, Superior, Wisconsin,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

RESPONSE BY RESPONDENTS TO MEMORANDUM FOR UNITED STATES

Statement

The Solicitor-General agrees that the General Counsel of the National Labor Relations Board had no opportunity to evaluate the 1963 picketing in Superior, which forms the basis for the present suit, because Hanna did not file an

8(b)(4)(B) charge with regard to that picketing. Accordingly, the 1963 picketing "arguably" contained secondary elements which the Board could reach under 8(b)(4)(B). (Memorandum for United States, p. 13.)

The Solicitor-General then suggests that because of the "hybrid" nature of the picketing, the primary and secondary aspects of that picketing may be split into separate parts and that jurisdiction of the primary (organizational) picketing should be allocated to the state and that the secondary aspects of the same picketing is reachable by the Board under Section 8(b)(4)(B).

Discussion

1. The situation here is almost identical with that in *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U. S. 173 (1962). The Union involved in *Interlake* is the Union here involved. The complaint in *Interlake*, the findings and opinion of the state circuit court and the opinion of the Supreme Court of the State of Minnesota clearly show that the picketing there, as here, involved organizational as well as secondary aspects. The only other factor present in *Interlake* (not relevant here to the position of the Solicitor-General) was the questioned assumption of jurisdiction by the state court to determine whether the Union was a "labor organization" within the meaning of the National Labor Relations Act. This Court, having determined that the *Interlake* picketing involved secondary aspects and that the Union was "arguably" a "labor organization," both jurisdictional aspects of Section 8(b)(4)(B) of the Act, reversed the judgment of the state courts which had enjoined the picketing.*

The effect of the Solicitor-General's position is to require the Court to reverse *Interlake*, which was decided less than three years ago.

---

* It is not here disputed that the respondent Union is a "labor organization" within the meaning of the Act.

The two cases cited by the Solicitor-General in support of his position are inapposite. *Youngdahl* v. *Rainfair*, 355 U. S. 131 (1957) holds that the state court has jurisdiction to enjoin violent conduct, but not peaceful picketing, an area which is the "preempted 'domain' of the NLRB." In the instant case, it is the peaceful picketing itself, the heart of the very activity involved in both organizational and secondary conduct, which the Solicitor-General suggests may be enjoined by the state court. It might also be noted that *Youngdahl* v. *Rainfair* was decided by this Court before *Interlake*. In *Incres Steamship Co.* v. *International Maritime Workers Union*, 372 U. S. 24, 27 (1963), also cited by the Solicitor General, this Court held:

> "• • • [M]aritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of § 2(6), 29 U. S. C. § 152(6)."

Under the circumstances of that case there was no longer *any* dispute "arguably" within the jurisdiction of the Board. In the case at bar the picketing in Superior, Wisconsin, which was the object of the state court action, arguably contains secondary elements which the Board could reach under 8(b)(4)(B).

2. Neither *Interlake* nor the decision of the Wisconsin state court here deprive the state of all jurisdiction to regulate primary picketing where the object of the activity is to organize or compel recognition of the Union as the representative of supervisory personnel. The state may well have jurisdiction in respect to such picketing where the picketing is not arguably prohibited under Section 8(b) of the Act. The question to be determined in such situation will be whether Section 14(a) of the Act permits exercise of state jurisdiction or whether it was the intent of Congress in adopting 14(a) to occupy this field * and leave it "to the free play of economic forces". (See Memorandum

---

* Cf. *Teamsters* v. *Morton*, 377 U. S. 252 (1964).

for the United States, p. 7.) The case now before this Court does not present that question. The picketing here admittedly involves secondary aspects arguably prohibited by Second 8(b)(4)(B) and is reachable by the Board. State jurisdiction cannot therefore be asserted as to the same picketing, though it may also involve non-secondary aspects.

CONCLUSION

For the foregoing reasons and for the reasons set forth in respondents' brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LEE PRESSMAN,
DAVID SCRIBNER,
50 Broadway,
New York, N. Y., 10004,
Attorneys for Respondents.

INDEX

	Page
Statement	1
Argument:	
The State court had jurisdiction to enjoin the union's primary picketing	6
Conclusion	17
Appendix	18

CITATIONS

Cases:	
Alabama Marble Co., 83 NLRB 1047	10
Garner v. *Teamsters Union*, 346 U.S. 485	7
Incres Steamship Co v. *International Maritime Workers Union*, 372 U.S. 24	15
Jackson Electric Membership Corp., 106 NLRB 1019	10
Leonard Niederriter Co., 130 NLRB 113	10
Local 761, Electrical Workers v. *National Labor Relations Board*, 366 U.S. 667	7
Marine Engineers Beneficial Association v. *Interlake Steamship Co.*, 370 U.S. 173	5, 6, 9, 15, 16, 17
Modern Cleaners Co., 100 NLRB 37	10
Moore Dry Dock, 92 NLRB 547	3, 13
National Labor Relations Board v. *Budd Mfg. Co.*, 169 F. 2d 571, certiorari denied, 335 U.S. 908	10
Panaderia Sucesion Alonso, 87 NLRB 877	10
Pure Oil Co., 84 NLRB 315	4
San Diego Trades Council v. *Garmon*, 359 U.S. 236	5, 6, 7, 8, 12

Cases—Continued Page
Teamsters v. *Morton*, 377 U.S. 252 ..... 7, 10
Teamsters v. *Vogt*, 354 U.S. 284 5
United Steelworkers v. *National Labor Relations Board*, 376 U.S. 492 7
Youngdahl v. *Rainfair*, 355 U.S. 131 15
Statute:
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):
Section 2(3) 3, 9, 16, 18
Section 2(5) 16
Section 2(11) 3, 9, 11, 18
Section 3(d) 7
Section 7 ..... 7, 8, 9, 19
Section 8(b) 16
Section 8(b)(4) 3, 5, 7, 13, 14, 15, 16, 19
Section 8(b)(7) 4, 5, 7, 10, 12, 13, 14, 20
Section 10(b) 7
Section 14(a) 9, 11, 21
Miscellaneous:
S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 5, 1 Leg. Hist. LMRA (1947) 411 9

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 7

THE HANNA MINING COMPANY, ET AL., PETITIONERS

v.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, AN UNINCORPORATED ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE [1]

STATEMENT

The question presented is whether a State court has power to enjoin peaceful primary picketing conducted for the purpose of compelling an employer subject to the jurisdiction of the National Labor Relations Board to recognize the union as the representative of individuals whom the Board has determined are supervisors and thus excluded from the coverage of the National Labor Relations Act.

[1] Pursuant to the Court's request, the government filed a memorandum prior to the grant of certiorari expressing the view that the court below had erred. In this brief, we amplify the views set forth in our earlier memorandum.

The underlying facts may be summarized as follows:

Petitioner Hanna Mining Company ("Hanna") owns and operates a number of ships which transport cargo on the Great Lakes. Hanna had a collective bargaining agreement with respondent District 2, Marine Engineers Beneficial Association ("MEBA") covering the licensed marine engineers employed aboard Hanna's vessels. The contract terminated in July 1962, and Hanna and MEBA entered into negotiations for a new contract. During these negotiations, a majority of Hanna's engineers informed Hanna that they no longer wished to be represented by MEBA. Thereupon, Hanna declined to negotiate further with MEBA until the question of representation was resolved by a secret ballot election. (R. 46–48; 20–22, 39–40.)

On September 12, 1962, MEBA began picketing Hanna's ship, *S.S. Joseph H. Thompson*, which was then being unloaded at Duluth, Minnesota.[2] The picketing resulted in a refusal by dock workers to continue unloading operations, and the ship left Duluth on September 28 with her cargo still unloaded. MEBA also engaged in picketing of Hanna ships at

[2] The signs read (R. 22–23):

HANNA MINING UNFAIR
TO
MARINE ENGINEERS
BENEFICIAL ASSOCIATION
REFUSES TO NEGOTIATE
CONTRACT
AFL-CIO
NO DISPUTE WITH ANY
OTHER EMPLOYER
S.S. JOSEPH THOMSON

various other ports of the Great Lakes, including Superior, Wisconsin. (R. 49, 22–23, 41.)

The same day the MEBA picketing began, Hanna filed a representation petition with the Regional Director of the National Labor Relations Board, requesting that an election be held among Hanna's engineers to determine whether or not they wished continued representation by MEBA. The Regional Director dismissed the petition on the ground that the persons in the proposed unit were not "employees" within the meaning of Section 2(3) of the National Labor Relations Act, but were "supervisors" as defined in Section 2(11) (see p. 18, *infra*). The Board denied Hanna's request for review, upholding the Regional Director's ruling that the engineers were supervisors. (R. 49–50, 57–58, 29–30.)

On September 15, 1962, Hanna filed charges with the Regional Director, alleging that MEBA had violated Section 8(b)(4)(B) of the Act (p. 19, *infra*) by inducing and encouraging work stoppages among employees of employers other than Hanna at the docks in Duluth. The Regional Director dismissed these charges, and the General Counsel of the Board sustained the dismissal on the ground that the evidence did not show a secondary object proscribed by Section 8(b)(4)(B). The General Counsel pointed out that the picketing conformed to the standards for primary picketing established by the Board in the *Moore Dry Dock* case,[1] and that the oral appeals to neutral employees were likewise primary since they were limited to inducing those employees to cease

[1] 92 NLRB 547.

working aboard Hanna's ship.[4] The General Counsel added that MEBA's activity at other sites did not evince an unlawful secondary object, inconsistent with the primary object of the picketing in Duluth. (R. 50, 31–32.)

On September 27, 1962, Hanna filed with the Regional Director charges alleging that MEBA's picketing had an organizational or recognitional objective and was barred under Section 8(b)(7) of the Act (p. 20, *infra*). The Regional Director refused to issue a complaint, and the General Counsel upheld the ruling on the ground that "the supervisory status of the licensed engineers precluded a finding that the Union's picketing and other activity was for an object proscribed by Section 8(b)(7) of the Act" (R. 50–51, 34–35, 36–38).

MEBA continued its picketing of Hanna ships until the close of the Great Lakes navigation season in December 1962. In May 1963, when the Lakes became navigable again and Hanna ships appeared in the harbor at Superior, Wisconsin, MEBA recommenced its picketing. (R. 49, 28, 42–43.)

On June 24, 1963, Hanna filed a complaint in the Circuit Court for Douglas County, Wisconsin, seeking an injunction against the picketing at Superior. The complaint and the supporting affidavits alleged that MEBA was picketing Hanna's vessels at the ore loading docks of the Great Northern Railway Company at Superior, with signs similar to those used in the 1962 picketing; that the picketing had the same objective as the earlier picketing, *i.e.*, to compel Hanna to

[4] See *Pure Oil Co.*, 84 NLRB 315.

recognize MEBA, and to compel its engineers to become members of that Union, even though those employees did not desire MEBA as their representative; that such objective was unlawful under Wisconsin law;[5] and that the Board previously had determined that the engineers were supervisors to whom the National Labor Relations Act did not apply. They further alleged that the picketing was causing work stoppages among individuals employed by employers other than Hanna. (R. 6–13, 14–43, 46–53.) The complaint sought to enjoin MEBA, *inter alia*, from picketing the vessels of Hanna or the docks where they were located, and from seeking to compel Hanna to employ only members of MEBA or to force its employees to become and remain members of MEBA (R. 52). The Circuit Court, on motion of MEBA, dismissed the complaint for lack of jurisdiction over the subject matter, and the Supreme Court of Wisconsin affirmed (R. 1–6, 43).

The Supreme Court of Wisconsin concluded that MEBA's picketing, as described in the complaint and supporting affidavits, arguably violated Sections 8(b)(4)(B) and (7) of the National Labor Relations Act, and thus, under this Court's decisions in *Garmon*[6] and *Interlake*,[7] State regulation was barred, at least until the Board had determined this issue. The court held that the General Counsel's refusal to issue a complaint with respect to MEBA's picketing was not disposi-

[5] See *Teamsters* v. *Vogt*, 354 U.S. 284.

[6] *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236.

[7] *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173.

tive, since in its view only a decision by the Board itself was sufficient to resolve the status of disputed conduct under the National Labor Relations Act.[a] The court also noted that the picketing which was the basis of Hanna's State court suit took place at Superior, Wisconsin, in June 1963, while the picketing dealt with by the General Counsel of the Board took place at Duluth, Minnesota, in September 1962. (R. 66–76.)

ARGUMENT

THE STATE COURT HAD JURISDICTION TO ENJOIN THE UNION'S PRIMARY PICKETING

In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245, this Court held that, when "an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." And, in *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173, the Court specifically applied this principle to the picketing activities of MEBA, the labor organization here.[b] A Board determination of whether activity is prohibited by the National Labor Relations Act ordinarily may be obtained by filing an unfair labor practice charge with the General Counsel of the Board. If the General Counsel finds reasonable cause to believe that an unfair labor practice has been committed, he will issue a

[a] In so holding, the Wisconsin court relied on the passage from *Garmon* set forth at p. 8, *infra*.

[b] *Interlake* is discussed at pp. 15–17, *infra*.

complaint [10] and the matter will ultimately go before the Board for decision. If, on the other hand, he finds no reason to believe that an unfair labor practice has been committed, he will decline to issue a complaint and the matter will never reach the Board. In the usual case, the General Counsel's refusal to issue a complaint does not "define the nature of the activity with unclouded legal significance" (*Garmon*, 359 U.S. at 246), and hence does not permit the States to step in.

The Act, for example, prohibits peaceful picketing when it is conducted for the secondary objectives proscribed by Section 8(b)(4)(B), and limits picketing, even though it is directed only at the primary employer, when it is conducted for recognitional or organizational purposes (Section 8(b)(7)).[11] In general, peaceful picketing otherwise falls either within the specific protection of Section 7 of the Act or within the area which Congress has designedly left to the free play of economic forces.[12] In these circumstances, it is apparent that, should the General Counsel refuse to issue a complaint on charges alleging that picketing was being conducted in violation of Section 8(b)(4)(B) or Section 8(b)(7), this would normally not be sufficient to establish that the activity was re-

[10] See Sections 10(b) and 3(d) of the Act (29 U.S.C. 160(b), 153(d)).

[11] These provisions are set forth at pp. 19–21 *infra*. For the distinction between primary and secondary picketing, see *Local 761, Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667; *United Steelworkers* v. *National Labor Relations Board*, 376 U.S. 492.

[12] See *Garner* v. *Teamsters Union*, 346 U.S. 485, 499–500; *Teamsters* v. *Morton*, 377 U.S. 252, 259–260.

moved from the preemptive effect of the Act. Such refusal would merely indicate that there was insufficient evidence to bring the picketing within one of the Act's prohibitory bans; it would not negate the possibility that the picketing was affirmatively protected by Section 7 or designedly left free.

It was to this situation, as well as to that where the Board declined to assert jurisdiction for policy reasons, that the following statement in *Garmon* (359 U.S. at 245–246) apparently was addressed:

> To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. * * * [T]he Board may * * * fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. * * *

The Wisconsin Supreme Court, relying on this statement, concluded that, since the General Counsel had declined to issue complaints, there had been no opportunity for the Board to define "with unclouded legal

significance" the nature of MEBA's picketing of the Hanna vessels, and that therefore the State court was without power to regulate such activity. We submit that, in the special circumstances of this case, the Board definitively has determined that, insofar as MEBA's picketing of the vessels was primary, it is outside the ambit of the NLRA. The Wisconsin court thus was empowered to enjoin the picketing to that extent.

1. It is clear that efforts to organize persons who are "supervisors," rather than "employees," are not protected by the NLRA. Section 7 of the Act, which protects the right to self-organization, is limited to "employees," and, by the 1947 amendments to the NLRA, Congress removed "supervisors" from the category of "employees."[18] Its purpose in doing so was to "relieve employers who are subject to the national act from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees." S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 5, 1 Leg. Hist. LMRA (1947) 411; see *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. at 178, n. 5. This is made manifest in Section 14(a) of the Act (p. 21, *infra*), which provides that, although supervisors are free to join unions, "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for purposes of any law, either national or local, relating to collective bargaining." Congress having left employers free from federal, as well as from State, compulsion to rec-

[18] See Sections 2(3) and 2(11) of the Act, p. 18, *infra*.

ognize and bargain with a union representing supervisors, efforts by a union to compel such recognition and bargaining are not protected by the NLRA."[14]

It is equally clear that primary picketing for the purpose of forcing an employer to bargain with a labor organization as the representative of supervisory personnel, or forcing supervisory personnel to accept that labor organization as their collective bargaining representative—the alleged objects of MEBA's picketing here—is not prohibited by the NLRA, not even "arguably" so. Section 8(b)(7) (p. 20, *infra*), the provision regulating picketing for organizational or recognitional purposes, explicitly applies only to picketing directed at "employees."

Finally, there is nothing in the history or policies of the NLRA which suggests that Congress, although neither protecting nor prohibiting organizational picketing directed at supervisors, intended such picketing to be beyond the reach of the States. Cf. *Teamsters* v. *Morton*, 377 U.S. 252, 259–260. The evil of organizational picketing—*i.e.*, that it tends to coerce the persons involved to join, and the employer to recognize, the picketing union—is precisely the same whether the picketing is directed at supervisory personnel or at employees. Accordingly, the failure of Congress to prohibit such picketing when directed at supervisors can only be explained on the ground that

[14] See *National Labor Relations Board* v. *Budd Mfg. Co.*, 169 F. 2d 571 (C.A. 6), certiorari denied, 335 U.S. 908; *Alabama Marble Co.*, 83 NLRB 1047, 1049, 1074; *Modern Cleaners Co.*, 100 NLRB 87, 38–39; *Jackson Electric Membership Corp.*, 106 NLRB 1019; *Leonard Niederriter Co.*, 130 NLRB 113; cf. *Panaderia Sucesion Alonso*, 87 NLRB 877, 880–883.

the NLRA does not, as a general matter, deal with organizational activity among supervisors—it does not show that Congress intended to leave the subject unregulated by other means. Nor does Section 14(a) of the Act compel a contrary conclusion. That section prohibits a State from imposing on an employer the duty to recognize a union of supervisors; it does not preclude a State from protecting an employer from union pressure designed to force such recognition. Indeed, to read the latter prohibition into Section 14(a) would defeat its very purpose to insure the freedom of employers not to recognize a union representing supervisors.

2. In this case, there has been a definitive adjudication by the Board that Hanna's engineers were supervisors under the NLRA. In September 1962, when MEBA's picketing first began, Hanna filed a representation petition with the Board's Regional Director requesting that an election be held among its engineers, the Regional Director dismissed the petition on the ground that the engineers were supervisors as defined in Section 2(11) of the Act, and the Board denied Hanna's request for review on the same ground (p. 3, *supra*).

In the light of this authoritative ruling by the Board, it followed (see pp. 9–11, *supra*) that the Act was indifferent to bargaining or organizational efforts on behalf of Hanna's engineers. The Act did not compel Hanna to bargain with a union for those engineers, even if the union represented a majority; nor was picketing of Hanna for the purpose of obtaining recognition as the representative of the engi-

neers subject to regulation under Section 8(b)(7). Accordingly, when Hanna, shortly after its representation petition was denied, filed an 8(b)(7) charge with the General Counsel, he properly dismissed it on the ground that, in view of the Board's determination of supervisory status, Section 8(b)(7) was inapplicable to the picketing (p. 4, *supra*).

In these circumstances, irrespective of what may be the result in other cases, the ruling of the Board on the representation petition coupled with the General Counsel's refusal to issue a complaint on the 8(b)(7) charge have determined "with unclouded legal significance" (*Garmon*, 359 U.S. at 246) that the NLRA neither protects MEBA in, nor prohibits it from, engaging in primary picketing of Hanna's vessels for the purpose of compelling Hanna to recognize it as the representative of its engineers. Therefore, there is no valid justification for barring the State from regulating that picketing, if it so chooses.

The contrary conclusion leads to a result which the court below termed a "paradox" (R. 76): MEBA's primary picketing—though neither "arguably" protected nor prohibited by the NLRA, and not designedly left unregulated by Congress—is nevertheless free of State restraint, notwithstanding that the activity is allegedly unlawful under State law. Such an anomalous hiatus in the regulation of MEBA's organizational picketing is not compelled by, nor does it serve in any way to further, the principles underlying the *Garmon* preemption doctrine—*i.e.*, the avoidance of potential interference with the policies of the NLRA.

3. The State is not deprived of all jurisdiction to regulate MEBA's picketing because the latter may have "secondary" as well as "primary" aspects.

The picketing of the Hanna ships at Superior, like most ship picketing, occurred at a common situs, *i.e.*, a location where not only Hanna, but also other employers, were engaged in business. Under the Board's *Moore Drydock* criteria,[15] picketing at such a situs is secondary and within Section 8(b)(4)(B) if it is directed at the secondary employers and their employees, but it is primary and outside that section if every reasonable effort has been made to confine the picketing to the primary employer's operations. Since the picketing of the Hanna ships appears to have caused the employees of the other employers on the common situs to stop work, a question arises as to whether this was the result of the picketing directed against Hanna, or the result of a deliberate effort to direct the picketing at the secondary employers.[16] Insofar as the picketing was secondary, the Board would be able to check it under Section 8(b)(4)(B) even though the ultimate object were to secure recognition on behalf of supervisors, since the protection of that section extends to "any person engaged in commerce" (see p. 19, *infra*). Although the General Counsel of the Board found that the 1962 picketing at Duluth was not secondary (pp. 3–4, *supra*), he had no opportunity

[15] 92 NLRB 547, 549.

[16] Hanna's complaint in this case alleged that the picketing caused work stoppages on the part of neutral employees, but it is not clear whether these were an incident of the primary picketing against Hanna, or due to more deliberate efforts (R. 51).

to evaluate the 1963 picketing at Superior, which forms the basis for the present suit, because Hanna did not file an 8(b)(4)(B) charge with regard to that picketing. Accordingly, the 1963 picketing "arguably" contained some secondary elements which the Board could reach under 8(b)(4)(B). The court below concluded that this possibility—which seems somewhat remote in view of the apparent similarity of the 1962 and the 1963 picketing—was sufficient to deprive the State courts of all jurisdiction in this case. We submit that the court below erred.

In the usual case of common situs picketing, the policies of the NLRA are furthered by excluding all State regulation, at least until the Board has evaluated the activity. For not only is the line between secondary and primary activity a delicate one but, to the extent that the activity is found to be primary, it cannot in any event be regulated by the State, since it would be protected by Section 7 or limited by Section 8(b)(7). In the instant case, however, it is clear that MEBA's primary picketing, since it seeks to attain recognition on behalf of supervisors who are not protected by the Act, is activity which the State could regulate irrespective of whether the General Counsel of the Board were to find that the picketing also had secondary aspects which the Board could proscribe under Section 8(b)(4)(B). In short, unlike the usual common situs picketing where both the secondary and primary aspects of the picketing are regulated by the NLRA, the picketing here was a hybrid: insofar as it was directed at Hanna alone, it was outside the regulatory sphere

of the Act and subject to control by the State; but insofar as it may have been directed at the other employers on the common situs as well, it was secondary and reachable by the Board under Section 8(b)(4)(B). The State, by an injunction limited to the primary aspects of MEBA's picketing, could reach the part of the picketing which is undeniably within its jurisdiction without at the same time encroaching upon the Board's jurisdiction over the secondary aspects (if any). The fact that the Board may ultimately proceed against the secondary aspects of the picketing consequently affords no valid justification in this case for denying to the State the power to reach that part of the picketing which is clearly within its regulatory sphere. Cf. *Youngdahl* v. *Rainfair*, 355 U.S. 131, which holds that, while the State could not enjoin all the picketing at the plant of an interstate employer, it was free to enjoin acts and threats of violence emanating from the picket line. And see *Incres Steamship Co.* v. *International Maritime Workers Union*, 372 U.S. 24 (State empowered to enjoin primary picketing of foreign flag ships, for the NLRA does not apply to employees on those ships; since such picketing usually occurs in a common situs situation, it, no less than the picketing here, "arguably" would always have secondary aspects).

4. The government's position herein is not inconsistent with, nor does it require an overruling of, *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173. There, as here, MEBA sought to represent the marine engineers on vessels owned by a company, and in furtherance of that ob-

jective engaged in picketing at docks where the vessels came into contact with the employees of secondary employers. The company obtained from a State court an injunction against the picketing. The State court held that MEBA's picketing was secondary and violated State law, and that the State had jurisdiction to regulate that picketing because MEBA represented only "supervisors" and thus was not a labor organization within the meaning of the NLRA.[17] This Court reversed. It held that the question whether MEBA is a labor organization was a difficult issue which should be determined by the Board in the first instance, and that, since there had been no definitive Board adjudication of that question, the picketing was arguably subject to the National Labor Relations Act and hence beyond the jurisdiction of the State court.[18]

The situation here is distinguishable. The question is not, as it was in *Interlake,* whether the union's picketing has secondary aspects which are arguably subject to prohibition under the secondary boycott provisions of the Act. Rather, it is whether, even if the picketing has such secondary aspects, the State

[17] Section 8(b) of the National Labor Relations Act merely proscribes unfair labor practices committed by a labor organization or its agents. Section 2(5) defines "labor organization" as an organization "in which employees participate," and supervisors are excluded from the definition of "employee" contained in Section 2(3).

[18] As the Court pointed out (370 U.S. at 176–177): "In the present case it has hardly been disputed, nor could it be, that the [unions'] conduct was of a kind arguably prohibited by § 8(b)(4)(A) of the Act and thus within the primary jurisdiction of the Board, if MEBA and Local 101 were 'labor organizations' within the contemplation of § 8(b) generally."

is nevertheless free to regulate the picketing insofar as it is primary. The latter question was not presented to the Court in *Interlake*. Moreover, here, unlike in *Interlake*, there has been a definitive Board ruling that Hanna's engineers whom MEBA seeks to represent are supervisors and thus it is clear that the union's primary picketing is neither prohibited, protected, nor otherwise regulated by the Act.[19] In these circumstances, there is no valid justification for precluding the State court from asserting jurisdiction over such picketing.

CONCLUSION

The judgment of the Supreme Court of Wisconsin should be reversed.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
STEPHEN B. GOLDBERG,
LAURENCE S. GOLD,
Attorneys,
National Labor Relations Board.

AUGUST 1965.

[19] Although in *Interlake* the State court had found that the engineers sought to be represented were supervisors, there had been no Board adjudication of that question (370 U.S. at 177, 182). Indeed, the union, in its petition in *Interlake*, suggested that the Board would have decided the question differently. See Petition for Certiorari in *Interlake Steamship Company* v. *Marine Engineers Beneficial Association*, No. 166, October Term, 1961, pp. 7–8, n. 2.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

SEC. 2. * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * * * *

SECTION 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) To engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restr in any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed

to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employes, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act, (B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods

or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

* * * * *

SECTION 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

U.S. GOVERNMENT PRINTING OFFICE: 1968

TABLE OF CONTENTS.

The Opinions Below 1

Jurisdiction 1

Questions Presented 2

Statutes Involved 3

Statement of the Case 3

Summary of Argument 11

Argument 17

I. State Courts Should Accord Final Legal Significance to NLRB General Counsel Rulings on Unfair Labor Practice Charges Under the Labor-Management Relations Act 17

II. A. The Supreme Court of Wisconsin Erred in Holding That the Initial Determinations of the NLRB and Its General Counsel Were Insufficient to Invoke State Court Jurisdiction 21

B. Recognition and Organizational Picketing of Supervisors Is Neither Protected Nor Prohibited by the Act and State Courts Are Free to Regulate Such Picketing 27

C. The State Court Was Not Deprived of Jurisdiction to Regulate MEBA's Primary Recognition and Organizational Picketing of Supervisors Because the Picketing May Also Have Secondary Objectives 31

D. Petitioners Should Have Been Given the Opportunity to Prove the Scope of the NLRB Determinations. The State Court Erred by Denying a Hearing on the Merits and Speculating on the Facts 34

E. Petitioners Were Entitled to the Benefit of Every Reasonable Inference and the State Court Erred by Summarily Dismissing the Complaint 36

F. The Procedural Requirements Created to Ensure a Cohesive National Labor Policy Are Being Used to Protect Picketing Which Is Illegal Under Both Federal and State Law. This Should Be Corrected 37

Conclusion 39

Appendix. Statutes Involved 40

TABLE OF AUTHORITIES.

Cases.

Alabama Marble Co., 83 NLRB 1047 27

Anderson et al., v. Local Union No. 698, 101 Ohio Appeals 542, appeal dismissed 165 O. S. 512 29

Building Service Employers Int. Union, Local 272 v. Gazzam, 339 U. S. 532 (Washington) 29

Douds v. International Longshoremen's Association, 147 F. Supp. 103 35

Garner v. Teamsters Union, 346 U. S. 485 29

Hourihan v. National Labor Relations Board, et al., 201 F. 2d 187, certiorari denied 345 U. S. 930, rehearing denied 345 U. S. 961, 346 U. S. 843, 346 U. S. 880 and 346 U. S. 917 19

Incres Steamship Co. v. International Maritime Workers Union, 372 U. S. 24 ..... 14, 34

Interlake SS Co. v. MEBA, 108 N. W. 2d 627 (Minnesota) 28

Jackson Electric Membership Corp., 106 NLRB 1019 27

Leonard Niederriter Co., 130 NLRB 113 27

Lewis v. Labor Board, 357 U. S. 10 19

Marine Engineers Beneficial Association v. Interlake Steamship Co., 370 U. S. 173 ---------- 21, 22, 23, 24, 25, 27, 28, 36, 37, 38

Modern Cleaners Co., 100 NLRB 37 ---------- 27

Moore Dry Dock, 92 NLRB 547 ---------- 22, 32

National Licorice v. Labor Board, 309 U. S. 350 ---- 35

NLRB v. Anchor Rome Mills, Inc. (CA-5) (1956), 228 F. 2d 775 ---------- 35

NLRB v. Budd Mfg. Co., 169 F. 2d 571 (CA-6), certiorari denied, 335 U. S. 908 ---------- 27

NLRB v. Harris (CA-5) (1953), 200 F. 2d 656 ------ 35

NLRB v. Kingston Cake Co. (CA-3) (1951), 191 F. 2d 563 ---------- 35

NLRB v. Pecheur Lozenge Co., Inc. (CA-2) (1953), 209 F. 2d 393 ---------- 35

NLRB v. Swift & Co., 233 F. 2d 226 ---------- 19

NLRB v. Westex Boot & Shoe Co. (CA-5) (1951), 190 F. 2d 12 ---------- 35

Pappas v. Stacey, 151 Maine 36, appeal dismissed 350 U. S. 870 ---------- 28-29

Retail Clerks et al. v. Schermerhorn, 373 U. S. 746 -- 36

San Diego Building Trades Council v. Garmon, 359 U. S. 236 - 2, 19, 21, 22, 23, 24, 30, 31, 33, 36, 38

Vogt, Inc. v. International Brotherhood, 270 Wis. 315, affirmed 354 U. S. 284 ---------- 23

Weber v. Anheuser Busch, Inc., 348 U. S. 468 ------ 29

Statutes and Regulations.

Labor Management Relations Act, as amended, 29 U. S. C. A. 141, *et seq.* ---------- 2, 3

Sec. 2(3) (29 U. S. C. A. 152(3)) - 3, 12, 27, 29, 40

Sec. 3(d) (29 U. S. C. A. 153(d)) - 3, 17, 18, 25, 40

Sec. 7 (29 U. S. C. A. 157) ------ 3, 24, 27, 26, 41

Sec. 8(b)(4) (29 U. S. C. A. 158(b)(4)) ------ 3, 7, 14, 22, 24, 25, 26, 32, 33, 35, 37, 41-42

Sec. 8(b)(7) (29 U. S. C. A. 158(b)(7)) ----- 3, 7, 8, 11, 12, 13, 20, 22, 24, 26, 28, 30, 41, 43

Sec. 10(b) (29 U. S. C. A. 160 b)) ---------- 25

Sec. 14(a) (29 U. S. C. A. 164(a)) ---------- ---------- 3, 12, 27, 29, 45

28 U. S. C. A. 1257 ---------- 2

29 C. F. R. Part 101, Sec. 101.6 ---------- 18

29 C. F. R. Part 102, Sec. 102.19 ---------- 18, 45

Miscellaneous.

House Report 510, June 3, 1947, on the Labor-Management Relations Act, 1947, U. S. Code Congressional Service, 80th Congress, First Session, 1947, page 1143 ---------- 18

S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 5, 1 Leg. Hist. LRMA (1947) 411 ---------- 27

Senate Report, U. S. Code Congressional and Administrative News, 1959, Volume 2, page 2381 ------ 28

Summer, Professor Clyde W., Yale Law School, 54 Labor Relations Reporter 11 (1963) ---------- 30

2 *Wisconsin Pleading and Practice,* pages 363-364 ---- 36

In the Supreme Court of the United States

No. 7.
OCTOBER TERM, 1965.

THE HANNA MINING COMPANY, *et al.*,
Petitioners,
v.
DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

BRIEF FOR THE PETITIONERS.

THE OPINIONS BELOW.

The Opinion of the Circuit Court for Douglas County, Wisconsin, dated July 25, 1963 (R. 1-5) and the Order thereon, dated July 26, 1963 (R. 5, 6) have not been reported.

The Judgment (R. 65) affirming the Circuit Court and the Opinion of the Supreme Court of the State of Wisconsin dated April 13, 1964 (R. 66-76) and Order denying a rehearing dated June 30, 1964 (R. 77) are reported in 23 Wis. (2d) 433, 127 N. W. (2d) 393.

JURISDICTION.

The Judgment of the Supreme Court of Wisconsin was entered on April 13, 1964 (R. 65) and petitioners' motion for rehearing was denied on June 30, 1964 (R. 77).

The petition for a writ of certiorari was filed on September 23, 1964, and granted on March 15, 1965 (R. 77).

The jurisdiction of this Court is invoked under Title 28, U. S. C. A. § 1257.

QUESTIONS PRESENTED.

1. Whether or not the determinations of the General Counsel of the National Labor Relations Board affirming the dismissal of unfair labor practice charges filed under the Labor-Management Relations Act, as amended, Title 29, U. S. C. A. § 141, et seq., should be accorded final legal significance upon the question of jurisdiction by the Wisconsin court as "initial determinations" of the National Labor Relations Board within the meaning of this Court's decision in *San Diego Unions v. Garmon*, 359 U. S. 236.

2. Whether or not the State Courts of Wisconsin may exercise jurisdiction to enjoin respondent labor organization from conducting recognition and organizational picketing of petitioners' vessels and the marine engineers employed thereon in Superior, Wisconsin, which is illegal under Wisconsin law, after the following initial determinations were obtained by the petitioners from the National Labor Relations Board:

(a) A dismissal of a petition for a representation election by a Regional Director and affirmed by the National Labor Relations Board upon a finding that the petitioners' marine engineers are supervisors excluded from the coverage of the Labor-Management Relations Act, as amended, Title 29, U. S. C. A. § 141, et seq.;

(b) Rulings by the General Counsel of the National Labor Relations Board affirming a Regional Director that the supervisory status of the marine

engineers precludes any application of Section 8(b)(7) of the federal Act to limit and restrain recognition and organizational picketing; and

(c) A ruling by the General Counsel of the National Labor Relations Board affirming a Regional Director that there was no evidence of any secondary boycott activity prohibited by Section 8(b)(4) of the Act in the conduct of the picketing.

STATUTES INVOLVED.

The statutes involved are material parts of the Labor-Management Relations Act, as amended, 29 U. S. C. A. § 141, et seq., consisting of Section 2(3) (29 U. S. C. A. § 152(3)); Section 3(d) (29 U. S. C. A. § 153(d)); Section 7 (29 U. S. C. A. § 157); Section 8(b)(4) and Section 8(b)(7) (29 U. S. C. A. § 158(b)(4) and (7)); and Section 14(a) (29 U. S. C. A. § 164(a)). They are printed in the Appendix at pages 40-45, *infra*.

STATEMENT OF THE CASE.*

Petitioners are corporations which own and operate vessels on the Great Lakes transporting cargoes in interstate and foreign commerce. The Hanna Mining Company, one of the petitioners, acts as agent and operates all of these vessels as an integrated fleet (R. 46, 47).

Marine engineers licensed by the United States Coast Guard are employed on petitioners' vessels as ship's officers. As part of their duties, the engineers supervise the work of unlicensed seamen who are represented by the United Steelworkers of America, AFL-CIO, in a bargain-

---

* The facts are based on the verified complaint, as amended, and affidavits, which were dismissed on respondent's motion (R. 6-43, 46-53), supplemented by exhibits introduced by mutual consent of the parties (R. 53-64).

ing unit designated by the National Labor Relations Board (herein "NLRB") comprising the vessel crews of all four petitioners (R. 17-19, 47).

Respondent District 2, Marine Engineers Beneficial Association (herein "MEBA") is a labor organization with a membership of licensed marine engineers; the other respondents are its officers, agents and representatives. It has labor agreements in effect with certain other companies operating vessels on the Great Lakes which contain provisions requiring compulsory Union membership as a condition of employment (R. 19, 44, 47, 48).

Petitioners had a collective bargaining agreement with the MEBA covering the licensed marine engineers employed aboard petitioners' vessels which terminated on July 15, 1962; thereafter, negotiations commenced for a new contract (R. 20, 48).

In August 1962, while contract negotiations were in progress, a majority of petitioners' marine engineers notified the petitioners in writing that they did not want to be represented by the MEBA. Petitioners promptly notified the MEBA of this development and took the position that further negotiations must be suspended until the question of representation was resolved; that the MEBA should investigate the authenticity of the engineers' written petitions by consulting with the marine engineers aboard their vessels; and that if the MEBA's investigation failed to confirm the authenticity of the written petitions from the marine engineers, the controversy should be submitted to arbitration. If the authenticity of the engineers' petitions was not disputed, petitioners proposed a secret ballot election conducted by an impartial party to determine whether or not the MEBA represented a majority. If such an election demonstrated that the MEBA repre-

sented a majority, petitioners would then recognize the MEBA as collective bargaining representative and resume contract negotiations (R. 20-21, 48).

In August and September, 1962, MEBA representatives boarded petitioners' vessels and consulted with the marine engineers. Without raising any question regarding the authenticity of the marine engineers' petitions disavowing the MEBA as collective bargaining representative, MEBA demanded an immediate resumption of contract negotiations. Petitioners refused to recognize the MEBA unless its majority status was established by means of a proper election (R. 21-22, 49).

On September 12, 1962, the MEBA commenced picketing the S. S. Joseph H. Thompson, one of petitioners' vessels, at a dock in Duluth, Minnesota, where its cargo was being unloaded (R. 22, 49). The picket signs read (R. 22-23):

"Hanna Mining Unfair
to
Marine Engineers
Beneficial Association
Refuses to Negotiate
Contract
AFL-CIO
No Dispute With Any
Other Employer
S. S. Joseph Thompson"

Dock workers refused to unload coal cargo from petitioners' vessel because of the picketing. The work stoppage continued until September 28, 1962, when the Thompson left with the remainder of her coal cargo aboard (R. 23).

The MEBA also commenced picketing petitioners' vessels at other Great Lakes ports on and after Septem-

ber 12, 1962, including Superior, Wisconsin. The same picket signs were used with appropriate changes for the name of each vessel (R. 23, 41, 49).

The MEBA picketing continued until on or about December 1, 1962, when the Great Lakes navigation season ended and all ships were laid up, as customary, for the winter months and the vessel crews were laid off. As a consequence of the MEBA picket lines, petitioners' vessels had been refused tug service in many Great Lakes ports; some dock workers at Superior, Wisconsin had refused to load iron ore cargoes into such vessels; and coal dock workers in Duluth, Minnesota had refused to unload the coal cargo from the S. S. Joseph H. Thompson (R. 23, 41, 49, 51).

None of the licensed marine engineers, other licensed officers, or unlicensed seamen employed on petitioners' vessels participated in any of the MEBA picketing activities and all such personnel continued working steadily aboard petitioners' vessels until the close of the navigation season in 1962. There were no work stoppages of any kind among petitioners' vessel crews (R. 23, 42, 52).

On September 12, 1962, as soon as the MEBA picketing commenced, petitioners requested the Regional Director of the NLRB at Cleveland, Ohio, to conduct a representation election among the licensed marine engineers aboard petitioners' vessels to determine whether or not the MEBA represented a majority (R. 24, 50). Upon investigation, the Regional Director dismissed the petition by letter dated September 25, 1962 (R. 57, 58), for the stated reason that the marine engineers were "supervisors" excluded from the coverage of the National Labor Relations Act. Upon appeal, the NLRB in Washington affirmed the Regional Director's dismissal by letter dated November 20, 1962 (R. 29-30), upon a finding that a unit

composed of supervisors was inappropriate for collective bargaining since supervisors are excluded from the Act and therefore no question concerning representation existed over which the NLRB had jurisdiction.

On September 15, 1962, petitioners filed charges with the Regional Director of the NLRB in Minneapolis, Minnesota, that the MEBA had engaged in secondary boycott activity violating Section 8(b)(4) of the Act (R. 53-54). After investigation, the Regional Director dismissed the charges by letters dated October 16, 1962 (R. 59-60) and October 22, 1962 (R. 62-63), which stated that as a consequence of investigation and consideration, it was concluded that no violation of Section 8(b)(4) of the Act is indicated. Upon appeal, the General Counsel of the NLRB in Washington affirmed the dismissal of the charge by letter dated December 10, 1962 (R. 31-33), stating, in part:

> "Furthermore, MEBA's activity at other sites did not evince an unlawful object on the part of the Union inconsistent with the ostensibly primary object of the picketing at the situs of the dispute. Nor did the totality of its conduct establish the unlawfulness of its activity."

On September 27, 1962, petitioners filed charges (R. 54) with the Regional Director of the NLRB in Cleveland, Ohio, that the picketing of petitioners' vessels with the object of forcing or requiring plaintiffs to recognize or bargain with the MEBA as the representative of its engineers or forcing or requiring such engineers to accept the MEBA as their Union representative violated Section 8(b)(7) of the Act and that by these and other actions the MEBA violated the National Labor Relations Act. After investigation, Regional Director dismissed the charge by letter dated October 5, 1962 (R. 34-35).

Upon appeal, the General Counsel of the NLRB in Washington affirmed the dismissal by letter dated November 26, 1962 (R. 36-37), stating that there was insufficient evidence that the picketing was for an object proscribed by Section 8(b)(7) of the Act since the MEBA was seeking representation rights in a unit comprised solely of "supervisors" as distinguished from "employees" within the meaning of the Act. In response to petitioners' request for clarification, the General Counsel amplified on the basis for affirming the Regional Director's action in a letter dated December 21, 1962 (R. 37-38), stating, in part:

> "Our disposition of this case was predicated solely upon our conclusion that the supervisory status of the licensed engineers precluded a finding that the Union's picketing and other activity was for an object proscribed by Section 8(b)(7) of the Act. Moreover, having reached a conclusion which in our view was dispositive of the charge in this matter, the appeal was denied without considering what the posture of the case would have been had the unit personnel been employees within the meaning of Section 2(3) of the Act. We might add that in processing the appeal in this manner, this office acted in accordance with its established practice."

In the latter part of April and May 1963, when the Great Lakes became navigable again, the petitioners' vessels were placed into operation (R. 15, 28, 41, 49). The MEBA resumed picketing at Superior, Wisconsin with signs identical to those used in 1962; there had been no picketing activity during the winter months while petitioners' vessels were laid up. Tugs refused to serve petitioners' vessels in Superior, Wisconsin, due to the picketing, causing delays during adverse weather and endangering the ships and their crews in the narrow channels

and confined waters of the harbors where navigation can be hazardous without tug assistance (R. 15-16, 28, 41, 51). Costly delays occurred to petitioners' vessels. The licensed engineers and other crew members ignored the picketing and continued working steadily aboard petitioners' vessels (R. 16, 23, 42, 52).

On June 24, 1963, petitioners filed a complaint in the Circuit Court for Douglas County, Wisconsin, seeking an injunction against the picketing at Superior (R. 6-13). The complaint and supporting affidavits alleged that the MEBA was picketing the petitioners' vessels at the ore loading docks of the Great Northern Railway Company in Superior with signs similar to those used in the 1962 picketing; that the objective of the picketing was the same as that of the earlier picketing, i.e., to compel petitioners to recognize MEBA and to compel its engineers to become members of that Union, even though those employers did not desire MEBA as their representative; that such objective was unlawful under Wisconsin law; that the Board had previously determined that the engineers were supervisors to whom the National Labor Relations Act did not apply; that the picketing was the cause of work stoppages among individuals of employers other than petitioners; and requesting an order enjoining the MEBA, *inter alia*, from picketing its vessels or the docks where they were located and from seeking to compel petitioners to employ only members of MEBA or to force its engineers to become and remain members of MEBA (R. 6-13, 14-43). On the following day, June 25, 1963, the Circuit Court granted a temporary restraining order against the picketing and issued an order to show cause why an injunction should not be granted (R. 13-14). Service was obtained on the MEBA and the other respondents, some of whom had to be served outside of the State of Wisconsin.

The MEBA appeared specially and moved for a dismissal of the complaint upon the grounds that the court lacked jurisdiction over the subject matter because the NLRB had exclusive jurisdiction thereof and the court had no jurisdiction over the persons of the defendants (R. 43-46). An amended complaint was filed by petitioners to clarify the pleadings (R. 46-53).

On July 25, 1963, the Circuit Court held in a Memorandum Opinion without any hearing on the merits that the Court lacked jurisdiction over the subject matter (R. 1-5). Thereafter, the Court entered an order on July 26, 1963, that the matter is within the jurisdiction of the NLRB and that the Court is without jurisdiction, dismissing the action, denying the restraining order and vacating the temporary restraining order (R. 5-6). The claim of the MEBA that the Circuit Court lacked jurisdiction over the persons of the defendants was not pressed.

Upon appeal, the Supreme Court of Wisconsin affirmed its Circuit Court on April 13, 1964 (R. 65-76) and denied petitioners' motion for a rehearing on June 30, 1964 (R. 77).

SUMMARY OF ARGUMENT.

The Supreme Court of Wisconsin erred by holding that the rulings of the General Counsel of the National Labor Relations Board with respect to unfair labor practice charges are not the "initial determinations" required to establish state court jurisdiction under the procedural requirements of this Court. The General Counsel of the Board has final statutory authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints involving unfair labor practices covered by the Act and he acts independently of any direction and control by the Board in such matters.

The General Counsel made a final jurisdictional determination in this case by ruling that the limitations and restraints of Section 8(b)(7) of the Act upon recognition and organizational picketing do not apply because, in a concurrent determination, the Board itself ruled that the engineers involved are "supervisors" excluded from the coverage of the Act. The exclusion of the personnel and the activity from the scope of the Act, rather than insufficient evidence of a violation, was thus determined. The General Counsel was acting within his statutory authority in so ruling, and his determination should be given final legal significance.

The conclusion of the General Counsel was that Section 8(b)(7) of the Act had no application to the recognition and organizational picketing by the MEBA due to the absence of "employees" among the personnel against whom the primary picketing of the MEBA was directed and that the primary picketing of the engineers who are "supervisors" for recognition and organizational objectives was not and never could be a violation of the federal Act. It seems obvious that Wisconsin was thereafter free to

assert jurisdiction and apply its state law which bans recognition and organizational picketing without encroaching upon federal jurisdiction or thwarting national labor policy.

The court below erroneously dismissed petitioners' amended complaint for relief from recognition and organizational picketing under state law despite the initial determinations by the Board and its General Counsel by holding that the picketing nevertheless remained within the exclusive jurisdiction of the Board. In so doing, the jurisdictional importance of the exclusion of supervisors from the coverage of the Act was ignored. The federal Act has no application, either protective or prohibitive, with respect to MEBA primary picketing of petitioners' vessels for recognition as a representative of supervisors and the laws of Wisconsin could therefore be applied to regulate such primary picketing.

The federal Act does not protect efforts to organize individuals employed as "supervisors" since Section 7, which protects the right to self-organization, is limited to "employees" and "supervisors" are explicitly removed from the category of "employees" under Section 2(3) of the Act. It was the purpose of Congress to relieve employers from any compulsion to accord the front line of management the anomalous status of employees. Congress also added Section 14(a) to the Act relieving employers of any duty to bargain collectively with supervisors or their representatives. Therefore, MEBA efforts by picketing or otherwise to compel recognition as collective bargaining agent for supervisors are not protected by the federal Act.

The evils of recognition and organizational picketing were recognized by Congress in 1959 when Section 8(b)(7) was enacted. The failure of Congress to restrain recog-

nition picketing directed at supervisors results from the general exclusion of supervisors from the coverage of the Act. The prohibition of recognition picketing by Wisconsin (and several other states) is consonant with federal labor policy; there is no repugnancy.

The states are free to regulate labor activities where doing so does not conflict with matters which have been pre-empted to the NLRB by the federal Act. To formulate a cohesive national labor policy, this Court requires the submission of "arguable issues" to the NLRB for "initial determinations" before a state court may assert jurisdiction. However, federal pre-emption is partial so that activity which is neither protected nor prohibited by the federal Act can be regulated by the states.

We submit that the state courts of Wisconsin had jurisdiction to regulate the MEBA primary picketing of petitioners' marine engineers and vessels for recognition after the Board ruled that these engineers were "supervisors" and its General Counsel ruled that Section 8(b)(7) of the Act did not apply due to absence of "employees" under the express wording of the statute. All of the essential jurisdictional issues had been resolved with unclouded legal significance, giving the Court below jurisdiction to apply state law. Otherwise, a paradox results in which primary picketing by the MEBA, although neither protected nor prohibited by the federal Act, and not designedly left free for the interplay of economic forces by Congress, nevertheless remains free of state restraint even though unlawful under state law. Such a "no-man's land" is not compelled by, nor does it advance, the avoidance of potential interference with the policies of the federal Act.

The jurisdiction of the state courts of Wisconsin over the primary recognition picketing of the supervisory marine engineers and petitioners' vessels by the MEBA at

docks was not affected by the possibility that such picketing may have "secondary" as well as "primary" aspects. Unlike ordinary common situs picketing in which all phases are regulated by the federal Act, the picketing in this case was a "hybrid." The primary recognition picketing was not covered by the federal Act and therefore subject to control by the state because "supervisors" are the objective. Any secondary boycott aspects directed at other employers on the docks which formed a common situs remained subject to Board regulation under Section 8(b)(4) of the federal Act. The two aspects are separable under the circumstances of this case because the federal Act does not extend to recognition picketing of supervisors. State court regulation of primary recognition picketing would not encroach upon Board jurisdiction over secondary activity in the same picketing because it involves no potential conflict with federal regulation.

An analogous situation is the primary picketing of foreign vessels which a state is empowered to enjoin because the federal Act does not apply to their crews.[1] Primary picketing of vessels, domestic or foreign, ordinarily occurs when they are docked. A common situs is involved where other employers and employees are engaged in their usual business activity, and potential secondary aspects are therefore present. Although the Board may have exclusive jurisdiction regarding the secondary aspects, this does not deprive state courts of jurisdiction to enjoin the primary picketing since there is no potential conflict between federal and state action.

The court below should have held a hearing on the merits and adduced evidence regarding the controversy including the scope of the rulings by the Board and its

---

[1] *Incres Steamship Co. v. International Maritime Workers Union*, 372 U. S. 24.

General Counsel because the petitioners' amended complaint sufficiently pleaded a violation of state law. Federal pre-emption over labor matters does not require state courts to deprive parties of hearings and determine facts by speculation. Any differences in the primary picketing due to the passage of time could only be determined from the evidence. Petitioners should have been accorded an opportunity to prove the geographical and substantive scope of the "initial determinations." Unfair labor practice charges merely initiate Board action. The investigation by the Board is not limited by the charge but includes all pertinent activity involved. Therefore, the picketing activity at Superior, Wisconsin, was investigated and considered by the Board and its General Counsel. Although petitioners were prepared to show that there were no changes in the conduct of MEBA picketing at Superior following the General Counsel's and Board determinations, the court below stated that subsequent picketing might have differed without adducing any proof.

The pleader is entitled to the benefit of every reasonable inference from well-pleaded facts whenever the sufficiency of a complaint is challenged. The court below ignored this rule. Petitioners' amended complaint for injunctive relief against recognition picketing illegal under Wisconsin law fully pleaded the initial determinations of the Board and its General Counsel to invoke state jurisdiction. It was error to summarily dismiss the action without a hearing on the merits.

The procedural requirements formulated by this Court to mold a cohesive national labor policy have been misapplied so as to protect primary recognition picketing which is illegal under both federal and state law. Such a result could not have been intended. This paradox results from the concept of the court below that state and federal

remedies over the same picketing activity are not separable, even though state regulation would be confined to the "primary aspects" and Board regulation is limited to "secondary aspects." No state relief can ever be obtained against recognition picketing directed against supervisors according to the court below so long as there is any possibility that the Board might eventually find a secondary boycott violation of the federal Act in the same picketing. As a practical matter, this renders it impossible to obtain state court relief, for such a possibility would always be "arguable" whenever a common work situs such as a dock is involved.

The court below erred in holding that it lacked jurisdiction to enjoin primary recognition and organizational picketing by the MEBA directed against marine engineers and their vessels after an initial determination by the General Counsel that such picketing is neither protected nor prohibited by the federal Act because of a Board ruling that the marine engineers are supervisors.

ARGUMENT.

I.

State Courts Should Accord Final Legal Significance to NLRB General Counsel Rulings on Unfair Labor Practice Charges Under the Labor-Management Relations Act.

The Supreme Court of Wisconsin erred by rejecting petitioners' contention that the rulings of the General Counsel of the NLRB upon unfair labor practice charges should be accorded final legal significance (R. 75-76):

> "Plaintiffs acknowledge the Garmon rule to the extent that a state agency or court has no jurisdiction over conduct arguably subject to NLRA until the NLRB has made a final determination that the conduct is not so subject. * * * They argue that the rulings of the General Counsel are determinations of the NLRB. Thus they assert that they have fulfilled the Garmon rule for avoidance of conflict between NLRB and courts and state agencies. Since, they would say, it has been finally determined that the conduct complained of is not an unfair labor practice, and presumably that such conduct is not protected by the Act because of the supervisory status of the people who are the object of the MEBA's effort, the state is now free to apply its own law. * * * plaintiff's logic seems clear, if they properly accord final legal significance to the acts of the General Counsel. But we do not read Garmon as permitting this result."

We submit that the Wisconsin Supreme Court should have given the rulings of the General Counsel of the NLRB acting within the scope of his statutory authority the same final legal significance as determinations of the NLRB itself with respect to unfair labor practice charges. This is clearly required by section 3(d) of the Labor-

Management Relations Act, as amended, 29 U. S. C. A. § 153(d), which provides, in part:

> "There shall be a General Counsel * * * appointed by the President, by and with the advice and consent of the Senate, for a term of four years. * * * *He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 160 of this title and in respect of the prosecution of such complaints before the Board,* and shall have such other duties as the Board may prescribe or may be provided by law." (Emphasis supplied.)

Any doubt concerning the General Counsel's authority is dispelled by the legislative history. In the Committee of Conference, House Report 510, June 3, 1947, on the Labor-Management Relations Act, 1947, U. S. Code Congressional Service, 80th Congress, First Session, 1947, on page 1143:

> "The General Counsel * * * is to have final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges and issuance of complaints of unfair labor practices, and in respect of the prosecution of such complaints before the Board."

The procedure of the Board is based upon the concept that the General Counsel's determinations are final.[1] Under the rules and regulations of the NLRB, 29 C. F. R., Part 102, § 102.19, the only review of a refusal by a Regional Director to issue a complaint upon an unfair labor practice charge is by the General Counsel. Consequently, he has the final authority to determine on behalf of the Board that the Act does not apply to a particular activity and there can never be a further determination by the

---

[1] Statements of Procedure of the NLRB, Series 8, as amended, 29 C. F. R., Part 101, § 101.6.

Board itself when the General Counsel declines to issue a complaint based upon lack of jurisdiction or any other reason.

It has been held by this Court,[1] and by federal courts,[2] that final action upon any unfair labor practice charge which is dismissed, for lack of jurisdiction, or other grounds, is taken by the General Counsel; such a charge never reaches the NLRB itself and the General Counsel's determination is final.

In *Hourihan v. National Labor Relations Board, et al.*, 201 F. 2d 187, on page 188:

> "Section 3(d) of the Labor-Management Relations Act provides that the General Counsel of the Board 'shall have final authority on behalf of the Board, with respect to the investigation of the charges and issuance of complaints under Section 10.' The Board cannot issue an order until the General Counsel issues a complaint. The Court has no power to order the General Counsel to issue a complaint and no power to require the Board to issue an order in a matter which is not before the Board."

This Court denied certiorari in the *Hourihan* case, 345 U. S. 930, rehearing denied 345 U. S. 961, 346 U. S. 843, 346 U. S. 880 and 346 U. S. 917.

It is clear that the determinations of the General Counsel of the NLRB, acting within his statutory authority, should be given the same legal significance as determinations of the NLRB itself. However, the Wisconsin Supreme Court interpreted *Garmon*[3] as preventing this result because of the language on pages 245, 246 therein:

---

[1] *Lewis v. Labor Board*, 357 U. S. 10, 15-16.

[2] *NLRB v. Swift & Co.*, 233 F. 2d 226, 231.

[3] *San Diego Unions v. Garmon*, 359 U. S. 236.

"To require the states to yield to the primary jurisdiction of the National Board does not insure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the states are ousted of all jurisdiction, or the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the states. However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by the refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance."

We submit that the refusal of the General Counsel to file a complaint does not always leave the status of the activity undetermined and thereby oust state courts of jurisdiction. In the special circumstances of this case, where the General Counsel has determined that the limitations and restraints of Section 8(b)(7) of the Act upon recognition and organizational picketing do not apply because the unit personnel are "supervisors" and not "employees" within the meaning of the Act under a concurrent finding of the NLRB, final jurisdictional determinations have been made.

II.

A. The Supreme Court of Wisconsin Erred in Holding That the Initial Determinations of the NLRB and Its General Counsel Were Insufficient to Invoke State Court Jurisdiction.

The Supreme Court of Wisconsin held that the principles laid down in *San Diego Unions v. Garmon*, 359 U. S. 236, and *Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U. S. 173, required the Wisconsin courts to decline to regulate recognition and organizational picketing of supervisors, illegal under Wisconsin law, despite all of the "initial determinations" obtained by the petitioners from the NLRB and its General Counsel upon issues arguably subject to NLRB jurisdiction and the Labor-Management Relations Act. It was the view of the court below that the controversy remained within the exclusive jurisdiction of the NLRB and this ousted the jurisdiction of the Wisconsin state courts. An anomalous situation manifestly resulted, as acknowledged by the Wisconsin Supreme Court in its Opinion (R. 76):

> "We recognize that in the circumstances of this case, the rule produces something of a paradox. MEBA's alleged organizational picketing is unlawful under Wisconsin law, and is probably not protected by federal law because of the supervisory status of the marine engineers. Such picketing cannot be prevented by NLRB procedure unless the NLRB General Counsel has probable cause to believe that MEBA's conduct is a secondary boycott. Yet since such picketing approaches being unlawful under federal law as a secondary boycott, Wisconsin must decline to enjoin it. On the record before us, we can perceive no escape consistent with the Garmon decision."

The NLRB had previously ruled, in effect, that since the engineers were supervisors there was no potential ap-

plication of the federal Act except upon the narrow ground of a possible violation of Section 8(b)(4) prohibiting secondary boycott activity. The state courts of Wisconsin declined jurisdiction because the picketing created a possibility of a secondary boycott violation over which the NLRB had exclusive jurisdiction. The end result is that recognition and organizational picketing of supervisors is left completely unregulated by any tribunal or agency, federal or state, and this result could not have been intended by Congress or by this Court.

The petitioners made every effort to obtain the "initial determinations" required by the *Garmon* and *Interlake* decisions, *supra*, before seeking state court relief in Wisconsin. The NLRB itself ruled that petitioners' marine engineers were supervisors (R. 29). The NLRB Minneapolis region ruled that no violation of Section 8(b)(4) of the Act "is indicated" on the part of the MEBA (R. 59-60, 62-63) and was affirmed by the NLRB General Counsel (R. 31-32) on the ground that there was insufficient evidence to establish that the MEBA had engaged in any unlawful secondary activity, and *that the picketing conformed to the standards prescribed for primary and common situs picketing* under *Moore Dry Dock*, 92 NLRB 547.

The NLRB Cleveland region dismissed petitioners' 8(b)(7) charge and the NLRB General Counsel affirmed stating there was insufficient evidence of proscribed picketing "particularly in view of the fact that the union was seeking representation rights in a union composed solely of supervisors as distinguished from employees within the meaning of the Act." (R. 36-37.) Upon request for clarification, the General Counsel stated (R. 37-38):

> "Our disposition of this case was predicated solely on our conclusion that the supervisory status of the li-

censed engineers precluded a finding that the Union's picketing and other activity was for an object proscribed by Section 8(b)(7) of the Act. Moreover, having reached a conclusion which in our view was dispositive of the charge in this matter, the appeal was denied without considering what the posture of the case would have been had the unit personnel been employees within the meaning of Section 2(3) of the Act. We might add that in processing the appeal in this manner, this office acted in accordance with its established practice. Accordingly, we have no alternative but to deny your request for reconsideration and to consider this case closed."

The complaint filed to enjoin the recognition and organizational picketing by the MEBA in Superior, Wisconsin, with supporting affidavits, on June 24, 1963, requested an order enjoining MEBA, *inter alia*, from picketing petitioners' vessels or the docks where they were located and from seeking to compel petitioners to employ only members of the MEBA or to force its engineers to become and remains members of MEBA. The Circuit Court, on motion of MEBA, dismissed the complaint, as amended, for lack of jurisdiction over the subject matter (R. 1-6) and the Supreme Court of Wisconsin affirmed (R. 65-77).

The Supreme Court of Wisconsin noted that organizational and recognition picketing by the MEBA was unlawful in Wisconsin under the rule established by *Vogt, Inc. v. International Brotherhood*, 270 Wis. 315, 321b, affirmed 354 U. S. 284 (R. 70), reviewed the *Garmon* and *Interlake* cases, and stated (R. 74-75):

"If the activity does not constitute a secondary boycott, the reason would seem to be that the activity was no more than 'primary picketing,' and apparently the Regional Director and General Counsel were not convinced that the activity went beyond primary picket-

ing. It would seem to us, in contemplation of the Garmon rule as stated by the Supreme Court, that the drawing of the distinction between the secondary boycott and the primary picketing should surely be performed by the NLRB."

The Supreme Court of Wisconsin then concluded that MEBA's picketing, as described in the complaint and supporting affidavits, arguably violated Sections 8(b)(4) and 8(b)(7) of the Labor-Management Relations Act (R. 75) despite the previous rulings by the NLRB and its General Counsel and, therefore, under the decisions of this Court in *Garmon* and *Interlake*, state regulation was barred until the NLRB itself had conclusively determined these issues because rulings by the General Counsel were insufficient (R. 75-76).

The court below understands the decisions of this Court as requiring the NLRB to make comprehensive rulings particularizing the nature of the labor activity and jurisdictional issues before a state court can assert jurisdiction even though the record disclosed that the NLRB refused to provide any opinions to the petitioners in the nature of a declaratory judgment (R. 29-30).

We submit that petitioners' complaint, as amended, incorporating the previous determinations and rulings of the NLRB and its General Counsel, set forth a *prima facie* case of illegal organizational and recognition picketing under Wisconsin law over which the Wisconsin courts were empowered to assert jurisdiction; the dismissal of petitioners' complaint, as amended, was based upon a misunderstanding of the decisions of this Court.

In *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 245, this Court held that, when "an activity is arguably subject to § 7 or § 8 of the Act, the states as well as the federal courts must defer to the exclusive com-

petence of the National Labor Relations Board if the danger of state interference with National policy is to be averted." And, in *Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U. S. 173, this Court specifically applied this principle to the picketing activities of MEBA. However, in *Interlake*, unlike this case, there had been no effort to present the underlying activity to the NLRB or its General Counsel, before instituting the state court action; the court below failed to perceive this important distinction.

The exclusion of supervisors from the Act gave special meaning to the General Counsel's rulings in this case.

A Board determination of whether activity is prohibited by the Labor-Management Relations Act is ordinarily obtained by filing a charge with the General Counsel. If the General Counsel finds reasonable cause to believe an unfair labor practice has been committed, he will issue a complaint (§ 10(b) and 3(d) of the Act, 29 U.S.C.A. 160(b) and 153(d)), and the matter is ultimately decided by the Board. If, on the other hand, the General Counsel finds that the evidence is insufficient to believe that an unfair labor practice has been committed, he declines to issue a complaint and the matter never reaches the Board. Thus, in the usual case, the General Counsel's refusal to issue a complaint does not "define the nature of the activity with unclouded legal significance" (*Garmon*, 359 U. S. 246), and the matter remains within the exclusive jurisdiction of the NLRB. However, the General Counsel made jurisdictional determinations by ruling that the Act did not apply to recognition picketing of the supervisory marine engineers in this case.

The Labor-Management Relations Act prohibits peaceful picketing when it is conducted for secondary boycott objectives by Section 8(b)(4), and limits primary

picketing conducted for recognition or organizational purposes by Section 8(b)(7). Otherwise, peaceful picketing falls either within the protection of Section 7 of the Act or within the area which Congress has purposely left to the free interplay of economic forces. When the General Counsel refuses to issue a complaint in the usual case on charges that picketing violated Section 8(b)(4) or Section 8(b)(7), such rulings would be insufficient to establish that the activity was not subject to the Act and within the exclusive jurisdiction of the NLRB; it would merely indicate that there was insufficient evidence that such picketing violated the Act and would raise the possibility that the picketing was affirmatively protected or purposely left free from any regulation. However, as previously pointed out, the General Counsel ruled that Section 8(b)(7) of the Act is not applicable to recognition picketing of the marine engineers and petitioners because the engineers are supervisors to whom the Act does not apply.

We submit that the Wisconsin courts erroneously considered this case in the same light as the ordinary case in which the applicability of the Act is evident but proof of a violation is lacking. The jurisdictional importance of the exclusion of supervisors from the coverage of the Act was not recognized. The court below failed to perceive that the determinations made by the NLRB and the General Counsel meant that the Labor-Management Relations Act has no application, either protective or prohibitive, with respect to the primary picketing by the MEBA of petitioners' vessels and that the Wisconsin courts were therefore empowered by these initial determinations to regulate the MEBA's primary picketing for recognition directed at the petitioners' vessels and the engineers employed thereon.

B. Recognition and Organizational Picketing of Supervisors Is Neither Protected Nor Prohibited by the Act and State Courts Are Free to Regulate Such Picketing.

The Labor-Management Relations Act does not protect efforts to organize individuals employed as "supervisors" rather than "employees." Section 7 of the Act, which protects the right to self-organization, is limited to "employees," and, in the 1947 amendments, Congress removed "supervisors" from the category of "employees" (Section 2(3) 29 U. S. C. A. § 152(3)). Its purpose was to "relieve employers who are subject to the national act free from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees." S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 5, 1 Leg. Hist. LMRA (1947) 411; *Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U. S. at 178, n. 5. The congressional will resulted in Section 14(a) of the Act which provides that, although supervisors are free to join unions, "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." Congress having legislated to free employers from federal, as well as state, compulsion to recognize and bargain with the union representing supervisors, efforts by a union to compel such recognition and bargaining are not protected by the Labor-Management Relations Act.[1]

The primary picketing by the MEBA to force petitioners to recognize it as the representative of the engi-

---

[1] *NLRB v. Budd Mfg. Co.*, 169 F. 2d 571 (CA-6), certiorari denied, 335 U. S. 908; *Alabama Marble Co.*, 83 NLRB 1047, 1049, 1074; *Modern Cleaners Co.*, 100 NLRB 37, 38-39; *Jackson Electric Membership Corp.*, 106 NLRB 1019; *Leonard Niederriter Co.*, 130 NLRB 113.

neers who are supervisory personnel, or forcing such engineers to accept the MEBA as their collective bargaining representative is not prohibited by the Labor-Management Relations Act, not even "arguably" so. Section 8(b)(7), the provision regulating picketing for organizational or recognition purposes, expressly applies only to picketing directed at "employees." [1]

There is nothing in the history or policies of the Labor-Management Relations Act which suggests or intimates that Congress, although neither protecting nor prohibiting organizational picketing directed at supervisors, intended such picketing to be beyond the reach of the states. In reporting upon the amendment which added Section 8(b)(7) to the Act (effective November 13, 1959), the Senate Report, U. S. Code Congressional and Administrative News, 1959, Volume 2, stated on page 2381:

> "Such picketing also has the purpose of coercing the employer into recognizing the Union and signing a contract with it, thus forcing the employees to join, even though the employees do not want the Union as their bargaining agent. The employer is thus coerced by the threat to his business to violate the law by coercing his employees into joining the Union. It would be difficult to imagine a technique more alien to the free choice with respect to unionization that the Taft-Hartley Act guaranteed to employees."

The evil of organizational picketing—i.e., that it coerces the persons involved to join and the employer to recognize the picketing union,[2] is precisely the same

---

[1] Section 8 (b) (7) became effective in 1959 after *Interlake, supra,* was decided by Minnesota and this amendment to the Act eliminates any conflict between Wisconsin and federal labor policy.

[2] Other states also ban recognition picketing: see *Interlake SS. Co. v. MEBA,* 108 N. W. 2d 627 (Minnesota); *Pappas v.*

(Continued on following page)

whether the picketing is directed at "supervisors" or "employees" within the meaning of the Act. Therefore, the failure of Congress to prohibit such picketing when directed at supervisors can only be explained by the exclusion of supervisors from the coverage of the Act, Section 2(3) and Section 14(a).

This Court has held that states are free to regulate labor activities where doing so does not conflict with matters which have been pre-empted to the NLRB by the federal Labor-Management Relations Act. In *Garner v. Teamsters Union*, 346 U. S. 485, on page 488:

> "The National Labor-Management Relations Act, as we have pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible."

In *Weber v. Anheuser Busch, Inc.*, 348 U. S. 468, on pages 480-481:

> "By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in Garner v. Teamsters Union, supra, but as the opinion

---

(Continued from preceding page)

Stacey, 151 Maine 36, appeal dismissed 350 U. S. 870; *Anderson et al., v. Local Union No. 698*, 101 Ohio Appeals 542, appeal dismissed 165 O. S. 512; *Building Service Employers Int. Union, Local 272 v. Gazzam*, 339 U. S. 532 (Washington).

in that case recalled, the Labor-Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' 346 U. S. at 488. This penumbral area can be rendered progressively clear only by the course of litigation."

This partial federal pre-emption in the regulation of labor activities is the only perceptible reason why it was considered necessary by this Court to require the submission of "arguable issues" to the NLRB for "initial determinations." [1] If federal pre-emption over labor activities were total, there would obviously be no necessity for drawing boundary lines between state and federal jurisdiction. Thus, it has been said, that union activity which is neither protected nor prohibited by the federal Act can be regulated by the states.

We submit that recognition and organizational picketing of supervisors is an area of labor activity which the states are free to regulate. In this case, the NLRB ruling that the petitioners' engineers were "supervisors" and the determination of the NLRB General Counsel that Section 8(b)(7) of the Act proscribing this type of picketing cannot be applied because the individuals against whom it is directed are "supervisors" and the presence of "employees" is required by the express wording of the statute, have determined all of the essential issues "with unclouded legal significance" (*Garmon*, 359 U. S. 246). Hence, the federal Act neither protects nor prohibits the MEBA from engaging in primary picketing of petitioners' vessels to compel recognition as the representative of its supervisory engineers. Therefore, we submit that Wisconsin courts are free to assert jurisdiction and regulate this picketing under state law.

---

[1] Professor Clyde W. Summer, Yale Law School, 54 Labor Relations Reporter 11 (1963).

The failure by the Wisconsin courts to give final legal significance to the determinations of the NLRB and its General Counsel leads to a result that the court below recognized as a "paradox," in which primary picketing by the MEBA, although neither "arguably" protected nor prohibited by the federal Act, and not designedly left free for the interplay of economic forces by Congress, nevertheless remains free of state restraint even though the picketing is unlawful under state law. Such a "no-man's land" is not compelled by, nor does it advance, the principles underlying the *Garmon* pre-emption doctrine which seeks the avoidance of potential interference with the policies of the Labor-Management Relations Act; the government of the United States concurs with our views.[1]

C. The State Court Was Not Deprived of Jurisdiction to Regulate MEBA's Primary Recognition and Organizational Picketing of Supervisors Because the Picketing May Also Have Secondary Objectives.

We submit that Wisconsin was not deprived of all jurisdiction to regulate the picketing of petitioners' vessels by the MEBA because such picketing might have "secondary" as well as "primary" aspects. Nevertheless, the Supreme Court of Wisconsin considered it to be of primary jurisdictional importance that the recognition and organizational picketing by the MEBA, which is unlawful under Wisconsin law, might also be or become unlawful under federal law as a secondary boycott and, for that reason, believed that state courts were compelled to decline to enjoin such picketing under the *Garmon* decision (R. 76). This conclusion must be incorrect. Otherwise, the whole

---

[1] See Memorandum for the United States filed by the Solicitor General and the National Labor Relations Board in this case.

field of potential relief is compressed into a possibility that the labor organization may eventually violate Section 8(b)(4) of the Act by engaging in secondary boycott activity which the NLRB will suppress and, in the meantime, no state limitations upon recognition and organizational picketing of supervisors can be applied. This creates total rather than partial federal pre-emption.

The picketing of petitioners' vessels at Superior occurred at a common situs where other employers, such as the dock and tug companies, were conducting their respective business operations. Under the criteria of the NLRB, set forth in *Moore Dry Dock*, 92 NLRB 547, 549, picketing at a common situs is secondary and unlawful within Section 8(b)(4)(B) if it is directed at the secondary employers and their employees, but such picketing is primary and outside the prohibition of that Section if every reasonable effort has been made to confine the picketing to the primary employer's operation. Since the picketing by the MEBA of petitioners' vessels did cause some work stoppages among employees of other employers on the common situs, the NLRB and its General Counsel were called upon to determine whether this was an incidental result of primary picketing directed at petitioners, or the result of secondary activity by the MEBA. The NLRB General Counsel concluded that the *Moore Dry Dock* criteria were being observed and the picketing was primary (R. 31-32). If the picketing were secondary, the NLRB could suppress it as a violation of Section 8(b)(4) of the Act even though the ultimate object was to secure recognition by the MEBA as the representative of supervisors, for the protection of this Section extends to "any person" engaged in commerce.

We submit that the primary picketing by the MEBA, since it seeks to obtain recognition as the representative of

supervisors who are excluded from the coverage of the Labor-Management Relations Act, is activity which the courts of Wisconsin could regulate after these initial determinations were obtained irrespective of any potential action by the General Counsel of the NLRB upon secondary aspects in the same picketing which the NLRB could proscribe under Section 8(b)(4) of the Act. This follows because unlike ordinary common situs picketing where both the secondary and primary aspects are regulated by the federal Act, the MEBA picketing in this case was a "hybrid." The primary picketing directed at petitioners was outside the coverage of the federal Act and therefore should be subject to control by the State of Wisconsin. Any secondary boycott aspects in the picketing, directed at employers other than petitioners on the common situs, was subject to regulation by the NLRB under Section 8(b)(4) of the federal Act. Consequently, the courts of Wisconsin under state law should be empowered to enjoin the MEBA's primary picketing as a violation of Wisconsin law because such relief cannot encroach upon the jurisdiction of the NLRB as to any secondary activity in the same picketing.

The basic consideration underlying federal pre-emption of labor matters is that states cannot be left free to control activities potentially subject to federal NLRB regulation because it would involve too great a danger of conflict with national labor policy (*Garmon, supra*). However, state regulation of recognition and organizational picketing of persons employed as supervisors excluded from the coverage of the federal Act involves no potential conflict with federal policy, for federal regulation in this field has been expressly excluded by Congress.

A parallel situation is the primary picketing of foreign vessels which a state is empowered to enjoin because the

federal Act does not apply to crew members on those ships.[1] Primary picketing of foreign vessels, as well as domestic ships, usually occurs in a common situs situation, as in the picketing here, and such picketing would have secondary aspects. Although the NLRB "arguably" has exclusive jurisdiction to proscribe any secondary aspects of picketing directed at foreign vessels, this does not deprive state courts of jurisdiction to enjoin the primary picketing because there is no potential conflict between federal and state action.

In our view of the controversy, it is immaterial whether or not any secondary activity was present in the picketing for recognition and organizational objectives in the spring of 1963 at Superior because regulation of the primary picketing was completely outside the jurisdiction of the NLRB as declared by the General Counsel after an NLRB finding that the engineers were "supervisors." Therefore, we submit that Wisconsin could regulate the primary picketing for recognition and organization of supervisors without regard to any possibility that it may be accompanied by secondary activity.

D. Petitioners Should Have Been Given the Opportunity to Prove the Scope of the NLRB Determinations. The State Court Erred by Denying a Hearing on the Merits and Speculating on the Facts.

Although the question was never definitively decided, both the Circuit Court (R. 4) and Supreme Court of Wisconsin (R. 75) commented that the picketing which the NLRB investigated in the fall of 1962 may be different from the picketing which petitioner sought to enjoin in the spring of 1963.

---

[1] *Incres Steamship Co. v. International Maritime Workers Union*, 372 U. S. 24.

Charges were filed and the facts pertaining to the picketing at Superior, Wisconsin, and elsewhere during the fall of 1962 were presented to the NLRB by the petitioners. Under NLRB procedure, the filing of a charge serves only as a request that the NLRB take action. Consequently, the NLRB investigation is not limited to the allegations contained in the charge but should include all pertinent facts. The NLRB may issue a complaint of violations of the Act which are developed by investigation and may include additional matters not mentioned in the charge, even those events which have occurred after the filing of the charge.[1]

In reliance upon the rule that a charge merely initiates NLRB action and need not encompass all of the activity involved,[2] petitioners furnished information to the NLRB Regional Director at Minneapolis regarding MEBA activities at Superior, Wisconsin, without filing separate charges regarding the activity there, and submitted affidavits from witnesses at Superior for NLRB consideration in the fall of 1962. The NLRB conducted an investigation of its own at Superior.

Petitioners interpreted the NLRB General Counsel's disposition of the 8(b)(4) charge on December 10, 1962 (R. 31-32), after the 1962 Great Lakes navigation season had ended, as encompassing MEBA picketing activity at Superior as well as other ports, from the context of the

---

[1] *National Licorice v. Labor Board*, 309 U. S. 350, 369; *Douds v. International Longshoremen's Association*, 147 F. Supp. 103, 108.

[2] See also *N. L. R. B. v. Kingston Cake Co.* (CA-3) (1951), 191 F. 2d 563; *N. L. R. B. v. Westex Boot & Shoe Co.* (CA-5) (1951), 190 F. 2d 12; *N. L. R. B. v. Pecheur Lozenge Co., Inc.* (CA-2) (1953), 209 F. 2d 393; *N. L. R. B. v Anchor Rome Mills, Inc.* (CA-5) (1956), 228 F. 2d 775; *N. L. R. B. v. Harris* (CA-5) (1953), 200 F. 2d 656.

ruling, inasmuch as the facts regarding such activity had been furnished.

Petitioners were unable to obtain a hearing upon the merits of the controversy, either in the Wisconsin courts or before the NLRB, and never had an opportunity to show the scope of the matters considered by the NLRB in Superior where the picketing before and after the NLRB General Counsel's determinations was identical; the same picket signs were used; many of the same pickets appeared; they stood in the same place; and they acted in the same way.

The perfunctory dismissal of the petitioners' amended complaint by the Wisconsin courts upon the assumption that any possibility of conduct violating the federal Act reposed exclusive jurisdiction in the NLRB even though some of the activity was admittedly outside NLRB jurisdiction, i.e., the primary organizational picketing of supervisors by the MEBA, was characterized as a "paradox" but required by *Garmon, supra.*

We submit that the Wisconsin court should have exercised jurisdiction and adduced evidence on the merits. *Garmon* and *Interlake, supra,* do not require state courts to determine facts by speculation.

E. Petitioners Were Entitled to the Benefit of Every Reasonable Inference and the State Court Erred by Summarily Dismissing the Complaint.

In Wisconsin, when the sufficiency of a complaint is challenged, the pleader should be given the benefit of every reasonable inference from well-pleaded facts. 2 *Wisconsin Pleading and Practice,* pages 363-364. This Court followed the same rule in *Retail Clerks et al. v. Schermerhorn,* 373 U. S. 746, 753-754.

The facts in the instant case closely parallel those in *Marine Engineers Beneficial Association v. Interlake SS Co.*, 370 U. S. 173, in which the MEBA picketed Great Lakes vessels in Duluth, Minnesota. Interlake filed a complaint in a Minnesota court charging violations of Minnesota law without first filing with the NLRB for "initial determinations." The Minnesota court held that the engineers were "supervisors" excluded from the federal Act, that the MEBA was not a "labor organization" within the meaning of the federal Act since "supervisors" were involved, denied MEBA's motion to dismiss and enjoined the picketing. This Court reversed Minnesota because of this failure to submit "arguable issues" for initial NLRB determinations.

In compliance with *Interlake, supra,* petitioners presented all issues to the NLRB and obtained "initial determinations." Petitioners' complaint for injunctive relief against recognition and organizational picketing illegal under Wisconsin law was based on these NLRB initial determinations and therefore set forth a cause of action which should not have been perfunctorily dismissed.

F. The Procedural Requirements Created to Ensure a Cohesive National Labor Policy Are Being Used to Protect Picketing Which Is Illegal Under Both Federal and State Law. This Should Be Corrected.

Petitioners, and other litigants similarly situated, are cast into a dilemma. No relief can be obtained, according to the Supreme Court of Wisconsin, against recognition and organizational picketing by a labor organization if the personnel involved are supervisors excluded from the coverage of the Labor-Management Relations Act, so long as there is any possibility that the NLRB might find a violation of Section 8(b)(4) of the federal Act prohibiting

secondary boycott activity in the picketing. This would make it impossible as a practical matter to obtain state court relief, for such a possibility will always be "arguable."

The Wisconsin Supreme Court regarded petitioners' efforts to obtain "initial determinations" from the NLRB to mean that the marine engineers involved, though ruled as supervisors by the NLRB, "arguably" continue to be "employees" (R. 75). This could not have been intended by *Garmon* and *Interlake, supra.* The procedure to be followed in resolving arguable issues to pave the way for state court jurisdiction should be clarified.

The procedural rules for molding a cohesive national labor policy have been misinterpreted and twisted into an obstacle to state court jurisdiction. This could not have been intended. Wisconsin views these procedural requirements as protecting recognition and organizational picketing that is illegal under both state and federal law. This Court should not permit such a "paradox" to continue.

CONCLUSION.

For the foregoing reasons, we believe that the Supreme Court of Wisconsin erred in holding that the state court lacked jurisdiction to enjoin primary recognition and organizational picketing by the MEBA directed against petitioners' vessels and the marine engineers employed thereon after the NLRB determined that such picketing is neither protected nor prohibited by the Labor-Management Relations Act because the marine engineers directly involved are supervisors.

Respectfully submitted,

LUCIAN Y. RAY,
1550 Union Commerce Building,
Cleveland, Ohio 44115
Counsel for Petitioners.

JOHN H. HANNINEN,
McCREARY, HINSLEA & RAY,
1550 Union Commerce Building,
Cleveland, Ohio 44115,

PAUL L. WITKIN,
JOHNSON, FRITSCHLER, WITKIN & JOHNSON, LTD.,
304-308 Telegram Building,
Superior, Wisconsin 54881,
Of Counsel.

APPENDIX.

STATUTES INVOLVED.

Relevant provisions of the Labor-Management Relations Act:

29 U. S. C. A. § 152 (Section 2).

"Definitions

"When used in this subchapter—

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

29 U. S. C. A. § 153 (Section 3).

"(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the

regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the Senate in which such nomination was submitted.

29 U. S. C. A. § 157 (Section 7)

"Right of employees as to organization, collective bargaining, etc.

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

29 U. S. C. A. § 158 (Section 8).

"Unfair labor practices

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

"(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

"Provided, that nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: Provided further, that for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution:

* * * * *

"(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representa-

tive of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

"(A) Where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title.

"(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

"(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, that when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, that nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

"Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection."

29 U. S. C. A. § 164 (Section 14).

"Supervisors as union members; recognition by employers

"(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

29 C. F. R., Part 102, NLRB Rules and Regulations, Section 102.19.

Review by the general counsel of refusal to issue.—If, after the charge has been filed, the regional director declines to issue a complaint, he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds. The person making the charge may obtain a review of such action by filing a request therefor with the general counsel in Washington, D. C., and filing a copy of the request with the regional director, within 10 days from the service of the notice of such refusal by the regional director. The request shall contain a complete statement setting forth the facts and the reasons upon which the request is based.

COPY

Office-Supreme Court, U.S.
FILED
SEP 22 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 7

THE HANNA MINING COMPANY, ET AL.,
Petitioners,

v.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE RESPONDENTS

LEE PRESSMAN,
DAVID SCRIBNER,
50 Broadway
New York 10004, New York,
Counsel for Respondents.

INDEX

	PAGE
The Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	2
Summary of Argument	6
ARGUMENT:	
I. The Picketing Conduct at Superior, Wisconsin In 1953 Which Admittedly Has Arguable Secondary Boycott Aspects Reachable by the Board and Which Has Not Been Considered or Acted On by the Board, Is Not Subject to State Action Under *Garmon*	9
II. Peaceful Picketing at a Common Situs Which In Any Aspect Arguably Violates the Act's Secondary Boycott Prohibition and Which Also Has As An Object Union Recognition on Behalf of Supervisor Is Not Subject to State Regulation	11
III. Peaceful Picketing In a Dispute Involving Supervisors Where Not Prohibited Under the Act Is Left to the Free Play of Economic Forces and Is Not Reachable by the State	19
Conclusion	23
Appendix—Statute Involved	24

Citations

PAGE

CASES:

Automobile Workers v. W.E.R.B., 351 U. S. 266 .. 16
Benz v. Compania Naviera Hidalgo S.A., 353 U. S. 137 18
Bethlehem Steel Co. v. NYSLRB, 330 U. S. 767 ... 20
Capital Service, Inc. v. NLRB, 347 U. S. 501 13
Garner v. Teamsters Union, 346 U. S. 485 ..... 8, 19
Guss v. Utah Labor Relations Board, 353 U. S. 1 21
Incres Steamship Company v. International Maritime Workers Union, 372 U. S. 24 .....7, 17, 18
Liner v. Jafco, 375 U. S. 301 9
Local 20, Teamsters' Union v. Morton, 377 U. S. 252 .....7, 8, 14, 21, 23
Local 100, United Ass'n of Journeymen v. Borden, 373 U. S. 690 9
Local No. 207, International Ass'n of Bridge Workers v. Perko, 373 U. S. 701 9
Local 761, Electrical Workers v. NLRB, 366 U. S. 667 10
Marine Engineers Beneficial Association v. Interlake Steamship Co., 370 U. S. 173 ..6, 7, 9, 14, 15, 16, 18
NLRB v. Budd Mfg. Co., 169 F. 2d 571, certiorari denied, 335 U. S. 908 20
NLRB v. Denver Building & Construction Trade Council, 341 U. S. 675 10
Napier v. Atlantic Coast Line R. Co., 272 U. S. 605 20
Republic Aviation Corp. v. National Labor Relations Board, 324 U. S. 793 10
San Diego Building Trades Council v. Garmon, 359 U. S. 236 .....5, 6, 9, 10, 11, 13, 14, 15, 16, 18, 19
Youngdahl v. Rainfair, 355 U. S. 131 ..... 7, 16

PAGE

STATUTE:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, et seq.):

Section 2(3) 2, 20, 24

Section 2(11) 2, 20, 24

Section 7 ..... 9, 24

Section 8(b) 10, 15, 25

Section 8(b)(4) 2, 3, 6, 9, 11, 18, 19, 25

Section 8(b)(7) 2, 3, 25

Section 10(l) 13

Section 14(a) 2, 8, 19, 20, 21, 22, 23, 26

Section 14(b) 21

Section 14(c) 21

MISCELLANEOUS:

H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, 1 Leg. Hist. LMRA (1947) 331 ..... 8, 22

S. Rep. No. 105, 80th Cong., 1st Sess., p. 5, 1 Leg. Hist. LMRA (1947) 411 22

Websters International Dictionary, 2nd ed., 1959 12

IN THE

Supreme Court of the United States

October Term, 1965

No. 7

THE HANNA MINING COMPANY, et al.,
Petitioners,

v.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE RESPONDENTS

The Opinions Below

The Opinion of the Circuit Court for Douglas County, Wisconsin, dated July 25, 1963 (R. 1-5) and the Order thereon, dated July 26, 1963 (R. 5, 6) have not been reported.

The Judgment (R. 65) affirming the Circuit Court and the Opinion of the Supreme Court of the State of Wisconsin dated April 13, 1964 (R. 66-76) and Order denying a rehearing dated June 30, 1964 (R. 77) are reported in 23 Wis. (2d) 433, 127 N. W. (2d) 393.

Jurisdiction

The Judgment of the Supreme Court of Wisconsin was entered on April 13, 1964 (R. 65) and petitioners' motion for rehearing was denied on June 30, 1964. (R. 77.)

The petition for a writ of certiorari was filed on September 23, 1964, and granted on March 15, 1965. (R. 77.)

The jurisdiction of this Court is invoked under Title 28, U.S.C.A. § 1257.

Question Presented

Whether a state court has power to enjoin peaceful picketing at a common situs where such picketing is arguably prohibited under Section 8(b)(4) of the National Labor Relations Act though the dispute involves supervisors as defined in the Act.

Statute Involved

The statutory provisions involved are: Sections 2(3), 2(11), 8(b)(4), 8(b)(7), and 14(a) of the National Labor Relations Act as amended, 29 U. S. C. 152(3) and 152(11), 29 U. S. C. 158(b)(4) and 158(b)(7), 29 U. S. C. 164(a). They are set forth in the Appendix to this brief.

Statement

The picketing by respondents ("MEBA") which was the basis for this action and for which relief was sought by petitioners ("Hanna") in the state court occurred in Superior, Wisconsin and commenced in April, 1963. Other allegations were made in the complaint with respect to picketing activities which occurred in 1962 in Duluth, Minnesota and other ports, and concerning which there were

proceedings before the National Labor Relations Board in 1962.* No Board proceedings were initiated as to the 1963 picketing in Superior, Wisconsin.

The complaint alleged that the picketing in Superior, Wisconsin, against which relief was sought in the state court, started in the latter part of April, 1963. (R. 9, 49.) The picketing was conducted at the shipyard of Fraser-Nelson Ship Building & Dry Dock Company and the ore loading docks of the Great Northern Railway Company in Superior, Wisconsin, and was carried on whenever any vessel owned or operated by Hanna was in the Superior, Wisconsin, dock. (R. 41.)

No claim is made that the picketing involved or threatened violence. The court below noted the absence of any element of violence in the picketing. (R. 70.)

The complaint further alleges that the objectives of this picketing were to compel Hanna to recognize MEBA as the collective bargaining representative for Hanna's engineers despite the contrary desires of such engineers and to "cause work stoppages among dock employees, to prevent harbor tugs from rendering towing services, to cause

---

*The Regional Director of the Board dismissed a representation petition filed by Hanna on September 12, 1962, on the ground that the engineers were "supervisors" within the meaning of the Act. The Board denied Hanna's request for review. (R. 9-10, 49-50, 57-58, 29-30.) The Regional Director of the Board dismissed charges of secondary boycott (Section 8(b)(4)(B) of the Act) filed by Hanna on September 15, 1962, because of insufficient evidence to sustain the charge. The General Counsel of the Board sustained the action of the Regional Director. (R. 10-11, 31-32, 50-51, 53.) The Regional Director refused to issue a complaint on charges filed by Hanna on September 27, 1962 that MEBA engaged in organizational picketing in violation of Section 8(b)(7) of the Act. The grounds for the Regional Director's action, sustained by the General Counsel, was that the supervisory status of the engineers precluded a finding of such violation. (R. 10-11, 34-38, 50-51, 54.) All such proceedings preceded the picketing in Superior, Wisconsin which commenced in April, 1963.

delays in the sailing of plaintiffs' vessels and to cause other economic loss and harm . . .". (R. 11.) The amended complaint, filed after hearing in the circuit court but before decision, characterized the alleged secondary effects as follows:

> ". . . [T]he said picketing has had and will continue to have the harmful effect of causing work stoppages among individuals employed by other employers and of preventing harbor tugs from rendering towage services, all of which delay and endanger plaintiffs' vessels, thus inflicting economic losses to plaintiffs and causing hazards to such vessels and their crews because dock workers, tug crews and other individuals employed by other employers decline to cross picket lines or are caused to refuse to perform services for plaintiffs as a result of the said picketing . . .". (R. 51.)

Hanna prayed that MEBA be enjoined from, among other things, "picketing, patrolling or bannering in any way the vessels of the plaintiffs or the docks where said vessels are located . . .". The court was also asked to enjoin MEBA from:

> "Attempting in any way to compel persons, partnerships or corporations who either seek to do business or are doing business with or performing services for plaintiff to cease doing its business or performing such services and attempting to compel them or any of them to refuse to enter upon plaintiffs' vessels or docks where such vessels are located." (R. 12.)

It is undisputed that the picketing at Superior, Wisconsin in 1963 was never made the subject of any National Labor Relations Board proceedings and that Hanna had never initiated any such proceedings. (Memorandum for United States as Amicus Curiae, pp. 14-15.) The 1963 picketing was not considered or acted upon by the National Labor Relations Board, its regional directors or General Counsel.

The circuit judge issued a temporary restraining order granting the injunctive relief requested. (R. 13-14.) After hearing on the motion for an injunction and on MEBA's motion to dismiss for lack of jurisdiction, that court determined that it had no jurisdiction. (R. 1-5.) The court noted that the National Labor Relations Board's refusal to "act in a particular case does not necessarily give the state court jurisdiction," and added:

> "Further, we do not know the facts in the present case are exactly the same as the case which the National Labor Relations Board investigated in the Fall of 1962 before it issued such order. The complaint in this case, at least, 'arguably', alleges facts which would be a secondary boycott, which are within the jurisdiction of the National Labor Relations Board." (R. 4.)

The Supreme Court of the State of Wisconsin unanimously affirmed the order of the circuit court dismissing the complaint for lack of jurisdiction. The court stated:

> "It may well be of significance also, that the activity considered by the general counsel took place in Duluth, Minnesota, in 1962, and the conduct which is made the basis for injunction occurred in Superior, Wisconsin, at later dates, and must at least differ in detail, if not in relevant substance." (R. 75.)

However, the court found it unnecessary to consider differences between the 1963 picketing in Superior, Wisconsin and the 1962 picketing in Duluth, Minnesota. The court held that it had no jurisdiction "since such picketing approaches being unlawful under federal law as a secondary boycott . . .", that the National Labor Relations Board had not made the determination required under *Garmon* * that the picketing was neither prohibited nor protected by the Act, and that it could "perceive no escape consistent with the *Garmon* decision." (R. 76.)

---

* *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236.

Summary of Argument

It is undisputed that the 1963 picketing at Superior, Wisconsin, which forms the basis for the present suit, was peaceful, arguably contained secondary boycott elements and had not been the subject of any National Labor Relations Board consideration or action. Allegations in the complaint with respect to picketing activities which occurred elsewhere in 1962 and concerning which there were proceedings before the Board in 1962 are not relevant to the issues now before the court.

A determination as to whether that 1963 picketing conduct violates Section 8(b)(4) of the Act must be left in the first instance to the Board and not to the courts. *San Diego Trades Council* v. *Garmon*, 309 U. S. 236; *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U. S. 173. The fact that the same picketing may not be protected under the Act and is unlawful under state law because it is alleged to have organizational objectives involving supervisors does not affect the preemption rule.

The peaceful picketing at a common situs, the only conduct here involved, had the dual objects of securing union recognition for petitioners' engineers alleged to be supervisors and of causing work stoppages among employees of other employers. This single indivisible act of peaceful picketing, albeit with two objects and termed a "hybrid" by the petitioners, cannot be split into two parts, one (the "primary" aspects) for regulation by the state and the other (the "secondary" aspects) for the action of the Board. Were the state to prohibit the peaceful picketing there would be nothing left for the operation of the Board's jurisdiction. The effect of such state action would be to preclude the Board from exercising its function in carrying out the national labor policy of the Act. More-

over, since Congress occupied that field of picketing conduct as a matter of national labor policy the state is precluded from asserting jurisdiction. *Local 20, Teamsters Union* v. *Morton*, 377 U. S. 252. That principle would apply whether or not the Board would ultimately find that the conduct was prohibited.

Interlake, in which the factual situation is virtually identical with this case, does not permit the severance of the picketing "hybrid" as suggested by petitioners. The Court set aside the entire injunction order issued by the state which prohibited any picketing despite the existence there, as here, of both "primary" picketing aspects affecting supervisors, and "secondary" aspects.

The rule that violent picketing aspects may be enjoined by the state while peaceful picketing is permitted, as expressed in *Youngdahl* v. *Rainfair*, 355 U. S. 131, does not support the suggestion of petitioners that the peaceful picketing "hybrid" here may be split into two parts, one for state action and the other for Board action. Violence, the only exception to the *Garmon* rule of preemption, can be readily extracted from the picketing conduct. Here state action enjoining the peaceful picketing would necessarily eliminate the single act of picketing as a basis for any action by the Board, thereby irretrievably depriving the Board of the opportunity which must be accorded it to exercise its jurisdiction over secondary aspects of that very picketing.

Nor does *Incres Steamship Company* v. *International Maritime Workers Union*, 372 U. S. 24, support the petitioners' suggested splitting of the peaceful picketing "hybrid". In that case the Court held that Congress chose not to make the NLRA applicable at all to disputes involving foreign registered ships. Under the rule of *Incres* the foreign-flag ship owners employing alien seamen may not avail themselves of the NLRA for relief against primary or secondary conduct.

By Section 14(a) of the Act, which grants supervisors the right to unionization and forbids federal or state compulsion against employers to deem supervisors as employees for collective bargaining purposes, Congress expressed a national labor policy affecting supervisors. The legislative history of Section 14(a) shows that the bill "very definitely states a national policy in respect of organization and collective bargaining by foremen." (H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 96). While Congress divested supervisors of the protection of the Act, it designedly left peaceful picketing in support of supervisors' right to unionization, to the free play of economic forces. A state may not impinge on such "free" area of conduct. *Garner* v. *Teamsters Union*, 346 U. S. 485, 500. If a state could in any way prohibit such peaceful picketing by supervisors, their Section 14(a) right to unionization would be made meaningless.

The rule that state regulation cannot reach areas of conduct which Congress designedly left "free" necessarily applies to conduct which may be neither "protected" nor "prohibited" under the Act. The full scope of that rule is expressed in *Local 20, Teamsters Union* v. *Morton*, 377 U. S. at 259-260, which holds that where Congress occupied a field or "focused upon but did not proscribe" conduct, a state may not proscribe the same type of conduct. Under *Morton*, proscription by the state of peaceful picketing involving the unionization of supervisors would "frustrate the congressional determination to leave this weapon of self-help available * * * ."

Having removed supervisors from the Act's protection, Congress was satisfied that the free play of economic forces without state prohibition would be in keeping with the desirability of a "balance of power" between supervisors and their employers. *Morton*, at 259-260.

ARGUMENT

I

The picketing conduct at Superior, Wisconsin in 1963 which admittedly has arguable secondary boycott aspects reachable by the Board and which has not been considered or acted on by the Board, is not subject to state action under *Garmon*.

The United States concedes that the Board's General Counsel "had no opportunity to evaluate the 1963 picketing at Superior, which forms the basis for the present suit, because Hanna did not file an 8(b)(4) charge with regard to that picketing". It is likewise conceded that "the 1963 picketing 'arguably' contained some secondary elements which the Board could reach under 8(b)(4)(B)". (Memorandum for United States, pp. 13-14.)

Nothing more is required to free this "area of conduct" from state regulation under *Garmon*.[1] The simple test stated in *Garmon* and thereafter reiterated and reinforced by this Court[2] is whether the conduct is "arguably" protected or prohibited by the Act. If so, the conduct is preempted for initial determination by the Board. The rationale for the rule of arguability is that where it is not clear whether the particular activity is governed by Sections 7 or 8 of the Act "the courts are not primary tribunals to adjudicate such issues", and that "it is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." (*Garmon*, 359 U. S. at 244-245.)

---

[1] *San Diego Trades Council* v. *Garmon*, 359 U. S. 236.

[2] *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U. S. 173; *Local 100, United Ass'n. of Journeymen* v. *Borden*, 373 U. S. 690; *Local No. 207, International Ass'n. of Bridge Workers* v. *Perko*, 373 U. S. 701; *Liner* v. *Jafco*, 375 U. S. 301.

Where conduct is "arguably" prohibited under the Act, as conceded to be the fact here, the *Garmon* rule is satisfied.[3] That rule cannot be interpreted to mean that where conduct is arguably prohibited, it must also be shown it would be arguably protected if it were not prohibited. Neither *Garmon* nor any of the subsequent decisions of this Court place this additional burden on the preemption doctrine. The decision as to whether the conduct is prohibited is solely within the Board's competence.

If the secondary aspects of the 1963 conduct were found by the Board to be prohibited under the Act, there would be no need for any determination as to whether the conduct was protected. Nor can it properly be a matter of speculation by the federal or state courts that the Board may find the conduct not to be prohibited. Allegations by the petitioner that the 1963 conduct was similar to the 1962 conduct which had been considered by the Board's General Counsel (R. 9, 49) cannot vest jurisdiction in the courts to assume or determine the similarity and to act thereon.[4]

---

[3] For the purpose of determination by the Board as to whether there was a violation of Section 8(b) of the Act it is sufficient that one object of the conduct violates that section. It is not necessary to find that it was the sole object of the picketing. *NLRB* v. *Denver Building & Construction Trades Council*, 341 U. S. 675. The same rule obviously applies in ascertaining whether such conduct is arguably a violation of Section 8(b) for the purposes of Board preemption.

[4] "The nature of the judicial process precludes an *ad hoc* inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and degree of federal-state conflict there involved, and more particularly what exact mischief such a conflict would cause. Nor is it our business to attempt this. Such determinations inevitably depend upon judgments on the impact of these particular conflicts on the entire scheme of federal labor policy and administration." (*Garmon*, 359 U. S. at 242.)

In *Local 761, Electrical Workers* v. *NLRB*, 366 U. S. 667, 674, this Court stated that the "nature of the problem [secondary boycott], as revealed by unfolding variant situations inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer." See also *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, 800.

The Wisconsin Supreme Court and the Wisconsin Circuit Court both noted that the 1963 conduct at Superior, on which this action is based and which was not the subject of Board consideration, may well have been different from the Duluth picketing in 1962 which was the subject of the actions of the Board or its General Counsel. (R. 75, 4.)

The Wisconsin Supreme Court saw fit to go beyond the simple issue of Board preemption raised by the secondary nature of the 1963 picketing. That Court also addressed itself to the preemption issues raised by the 1962 picketing in Duluth and held that the state court was without jurisdiction, by-passing the question of the differences between the 1962 Duluth and the 1963 Superior picketing. This does not alter the fact that the only revelant issue here is whether the 1963 conduct, which was never considered by the Board, was subject to state court jurisdiction. In any event, by the state court application of the *Garmon* rule to the 1962 picketing, the 1963 picketing was *a fortiorari* arguably within the ambit of Board action and therefore not within the reach of state power.

II

Peaceful picketing at a common situs which in any aspect arguably violates the Act's secondary boycott prohibition and which also has as an object union recognition on behalf of supervisors is not subject to state regulation.

While it is agreed by the petitioners and the United States that the 1963 picketing had secondary aspects which arguably violate Section 8(b)(4)(B) and is therefore reachable by the Board, they suggest that "The State, by an injunction limited to the primary aspects of MEBA's picketing, could reach the part of the picketing which is undeniably within its jurisdiction without at the same time

encroaching upon the Board's jurisdiction over the secondary aspects (if any)". (Memorandum for United States, p. 15; Petitioners' Brief, pp. 32-33.)

The conduct here involved consisted solely of peaceful picketing at a common situs. No other action by the pickets or MEBA is alleged. The objects of the picketing are alleged by Hanna to be twofold: to secure recognition of engineers (alleged to be supervisors) on Hanna's vessels, and to cause work stoppages among individuals or employees of other employers on the common situs. (R. 8-11, 50-52.) The overall relief sought in the state court was a restraint against "Picketing, patrolling or bannering in any way the vessels of the plaintiffs or the docks where said vessels are located . . ." (R. 12.)

Were the position of Hanna and the United States adopted, the activity complained of, *i.e.*, the actual picketing, would irretrievably be placed beyond the reach of the Board. The picketing itself, the only physical conduct involved, cannot be neatly severed into two parts, one for the action of the state and the other for the action of the Board.

Hanna and the United States consider the picketing here a "hybrid" and suggest that such hybrid, by definition a single entity,[5] may be split into two definable entities, one for the action of the Board, the other for the state court. The United States concludes:

> "The fact that the Board may ultimately proceed against the secondary aspects of the picketing consequently affords no valid justification in this case for denying to the State the power to reach that part of the picketing which is clearly within its regulatory sphere." (Memorandum for United States, p. 15.)

---

[5] A "hybrid" has been defined to be "anything of heterogeneous origin or composition," and in relation to living organisms, "a crossbred animal or plant." Webster's International Dictionary, 2nd Ed., 1959, p. 1210.

The fallacy in that approach is that this picketing was a single, indivisible act. Were the state to enjoin the picketing because one object is illegally to compel recognition of the union, the Board could not possibly determine whether the picketing has secondary boycott aspects, simply because there would be no picketing the objects of which could be considered by the Board.

The effect of such state action would be to preclude the Board from exercising a function in the national interest which Congress unequivocally entrusted to the Board.[6] The congressional intent to avoid the danger of conflict between the exercise of power by the Board to administer a national labor policy and the requirements of state law, would be effectively nullified, regardless of the particular means involved to bring about such nullification. *Garmon* considered this danger:

> "Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes." (*Garmon*, 359 U. S. at 244.)[7]

---

[6] Such state action would also preclude the Board from complying with the Act's mandate to proceed in the district court for a restraint against picketing with secondary aspects under Section 10(l) of the Act. In *Capital Service Inc.* v. *NLRB*, 347 U. S. 501, 505, the Court stated:

> "In order to make the § 10(1) power effective the Board must have authority to take all steps necessary to preserve its case. If the state court decree were to stand, the Federal District Court would be limited in the action it might take. If the Federal District Court were to have unfettered power to decide for or against the union, and to write such decree as it deemed necessary in order to effectuate the policies of the Act, it must be freed of all restraints from the other tribunal. To exercise its jurisdiction freely and fully it must first remove the state decree."

[7] Nor does the fact that petitioner may be injured as the result of state preclusion constitute a valid basis for denying Board preemption. *Garmon* states, "Even the States' salutary effort to redress private wrongs . . . cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." (*Garmon*, at 247.)

In *Local 20, Teamsters Union* v. *Morton*, 377 U. S. 252, 259-260, involving Section 303 of the Act, the Court reinforced the rule of *Garmon* by rejecting the reach of state power "to proscribe the same type of conduct which Congress focused upon but did not proscribe * * *." A contrary view, said the Court, would serve "to upset the balance of power between labor and management expressed in our national labor policy." [8]

Marine Engineers Beneficial Association v. *Interlake Steamship Co.*, 370 U. S. 173, militates against severance of the picketing hybrid suggested by petitioners and the United States. But for the question in *Interlake* whether the state court could determine that the union was a "labor organization" within the meaning of the Act, the factual situation there is virtually identical with that now under consideration. The *Garmon* rule applies equally to both situations.

In *Interlake*, as here, an injunction was sought in the state court against MEBA to restrain peaceful picketing which had as an object the recognition of the union as the bargaining representative on behalf of marine engineers employed by Interlake alleged to be supervisors. The picketing was peaceful, was at a common situs, *i. e.*, a dock where the Interlake vessels berthed, and involved secondary boycott aspects. The state court there asserted jurisdiction on the ground that the organizational picketing was addressed to marine engineers who were "supervisors" and therefore not employees within the meaning of the Act. In addition the state court held that MEBA was not a labor organization "within the meaning of the Act" because its membership consisted of supervisors and that therefore

[8] The preemption rule expressed in *Morton* would necessarily apply whether or not the "same type of conduct" (in the instant case, peaceful picketing alleged to involve secondary boycott elements) sought to be proscribed by the state, was acted upon by the Board or the General Counsel.

the NLRB had no jurisdiction with respect to the secondary boycott conduct charge. Injunctive relief was granted by the state court on the ground that the picketing violated the prohibition of state law against organizational or recognitional picketing. (Record, pp. 46-61, *MEBA* v. *Interlake Steamship Co.*, 370 U. S. 173.) The injunction there restrained MEBA from:

> "Picketing in any manner, peaceful or otherwise, at or in the vicinity of any of plaintiffs' vessels in the Duluth harbor, including the vessel Samuel Mather, and the dock operated by Carnegie Dock & Fuel Company at 600 Garfield Avenue, Duluth, Minnesota, and any other dock or similar company at or near which any of plaintiffs' vessels are moored for the purposes of loading or unloading." (Id. at 42.)

MEBA was also restrained from interfering with Interlake's employees' access to and from the vessels and from engaging in any secondary boycott conduct. (Id. at 41-43.)

This Court, in reversing, held that even as to the threshold question of "labor organization" on which rests the Board's jurisdiction over secondary activities, only the Board could make a determination. The *Garmon* rule protecting the exclusivity of NLRB jurisdiction could not be avoided where there was an arguable possibility of Board jurisdiction over the controversy. Moreover this Court said the Board had actually determined that MEBA was a labor organization for the purposes of Section 8(b) of the Act and it was the duty of the state court to defer to the Board's determination. (*Interlake*, 370 U. S. at 184-185.) It is significant that this Court did not confine itself to the secondary aspects of the picketing but set aside the entire injunction order. No suggestion was made by the Court that the recognitional picketing, illegal under state law, was, despite the secondary aspects of the picketing, properly enjoined by the state court.

In the instant case the issue as to whether MEBA was a labor organization within the meaning of the Act was not

in dispute. The record in the state court affirmatively shows that specific rulings had been made by the Board that MEBA was a labor organization. (R. 44-46, 70.) Extracting the issue of labor organization from the *Interlake* case left nothing there but the classic situation requiring the application of *Garmon*. The same is true in the present case, requiring *a fortiorari* the application of the *Garmon* rule.[9]

Youngdahl v. *Rainfair*, 355 U. S. 131, is suggested by the United States as support for its position that both the state and the Board may act in respect to the picketing "hybrid".[10] The Court there held that a state court could enjoin violations "emanating from the picketline", as the United States puts it, but preserved the right to engage in peaceful picketing, an area which is the "preempted 'domain' of the National Labor Relations Board". (*Youngdahl*, at 139.) The Court ordered such a modification in the judgment of the state court which had banned all picketing, peaceful or otherwise. Necessarily implicit in *Youngdahl* was the fact that the acts of violence were readily separable from the act of peaceful picketing. Elimination of the violent conduct by state action left intact the peaceful picketing conduct which was within the Board's "preempted domain."[11]

---

[9] Hanna agrees that the "facts in the instant case closely parallel those in *'Interlake'*" but that the difference between the two cases is that in *Interlake* there had been no prior Board determination on the issues whereas in the instant case relief was sought in the state court after "NLRB initial determinations". (Brief for Petitioners, pp. 25-37.) The simple answer to that is that there had likewise been no prior initial determination by the NLRB with respect to the 1963 picketing in Superior on which the action here is grounded.

[10] Memorandum for United States, p. 15.

[11] The exception of violent conduct to the general rule of Board preemption emphasizes rather than dilutes or diminishes the broad scope of the *Garmon* doctrine. In *Automobile Workers* v. *W.E.R.B.*, 351 U. S. 266, 272-273, fn 10, the Court noted the apparent exclusiveness of the violence exception.

Here, state action enjoining the 1963 peaceful picketing would necessarily eliminate the picketing as a basis for any action by the Board, thereby encroaching on the Board's admitted jurisdiction to act in respect to secondary boycotts.

The United States also suggests that *Incres Steamship Co.* v. *International Maritime Workers Union*, 372 U. S. 24, supports its position that the picketing "hybrid" can be split to allow the Board to act on secondary aspects, and characterizes the holding in that case as follows:

> "(State empowered to enjoin primary picketing of foreign flag ships, for the NLRA does not apply to employees on those ships; since such picketing usually occurs in a common situs situation, it, no less than the picketing here, 'arguably' would always have secondary aspects)." (Memorandum for United States, p. 15.)

However, *Incres* was not limited to the issue of "primary" picketing, nor was the holding premised only on the non-applicability of the Act to the employees on foreign flag ships. *Incres* (at 27) held that "maritime operations on foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of § 2(6), 29 U. S. C. § 152(6)." In other words, as the Court put it, "the Act does not apply to foreign-registered ships employing alien seamen." (at 26.) The basis for *Incres* was that Congress chose not to make the Act applicable *at all* to disputes involving such foreign flag maritime operations. Although *Incres* had before it evidence of secondary conduct by the unions involved [12] as well as primary activity, the Court did not determine or even suggest that while the primary conduct was enjoinable as beyond the reach of the Act, the secondary conduct, as it affected those foreign flag ship

---

[12] *Incres*, 372 U. S. at 26.

operators, was covered and therefore preempted by the Act.[13]

Answering the question as to whether *Garmon* as applied in *Interlake* results in preemption of state court jurisdiction if a dispute is arguably within the Board's jurisdiction, the Court in *Incres* stated, "... [O]ur decision in Sociedad Nacional clearly negates such [Board] jurisdiction now." (*Incres*, at 27). Unions involved in such situations are deprived of relief under the Act and foreign flag ship operators may also not avail themselves of the Act whether the conduct complained of is "primary" or "secondary".

The argument by the United States, as well as that by petitioners,[14] that, in the light of *Incres*, the state courts here may enjoin "primary" picketing at the common situs as unprotected by the Act and illegal under state law, and at the same time relegate to the Board the secondary aspects of the same picketing under Section 8(b)(4) of the Act, appears contrary to the holding in *Incres*.

---

[13] In *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 137, a foreign flag ship owner sought damages resulting from picketing and secondary activity. The Court held that the Act was not intended to apply to disputes between nationals of other countries operating ships under foreign laws. Mr. Justice Douglas, dissenting, suggested that a possible exception to the rule of *Benz* might be a suit by American companies for relief against injury from secondary conduct arising out of the kind of foreign flag ship dispute there involved. It was not suggested or intimated by the Court or the dissent that the primary employer, *i.e.*, the foreign flag ship employer, has available to him relief from secondary conduct under the National Labor Relations Act.

[14] Brief for Petitioners, pp. 14, 33-34.

III

Peaceful picketing in a dispute involving supervisors where not prohibited under the Act is left to the free play of economic forces and is not reachable by the state.

Even if the Board were to find that the 1963 picketing conduct complained of was not prohibited by Section 8(b)(4) and if it were to be assumed that the peaceful picketing was not protected by the Act because of the alleged supervisory nature of the personnel involved, the question would arise as to whether Congress intended to make available such picketing as a weapon of self-help and outside the reach of the state.[15]

Garner v. *Teamsters Union*, 346 U. S. 485, 500, states, "For a state to impinge on the area of labor conduct designed to be free is quite as much an obstruction of federal policy as if the state declared picketing free for purposes or by methods which the federal Act prohibits". *Garmon* (359 U. S. at 245) puts it this way, "Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States".

Section 14(a) of the Act, adopted as an amendment in 1947, provides:

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

---

[15] The United States agrees that such a question arises under the circumstances noted. (Memorandum for United States, pp. 10-12.)

By this section Congress granted a right to supervisors to join unions.[16] At the same time compulsion against employers in commerce by federal or state law to require collective bargaining for such personnel was prohibited. Section 14(a) evidenced a congressional intent to continue to maintain federal preeminence in the field of labor relations affecting employers subject to the Act and their supervisory personnel. The amendment does not grant jurisdiction to the state court that it did not have under the Act prior to the amendment.

This Court has noted that "the exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting". *Bethlehem Steel Co.* v. *NYSLRB*, 330 U. S. 767, 772; *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605.

Here Congress has undertaken to continue to deal with the relationship between employers subject to the Act and their supervisors. The fact that Congress has changed its views on the inclusion of supervisors under the Act and has accorded supervisors a different status outside the Act by not deeming them "employees" [17] is in itself evidence of intention to retain federal control of national labor policy in that area. Under these circumstances and in the absence of any specific contrary congressional mandate that the states may intercede in such area, the states are prevented from doing so.

---

[16] "Section 14(a) of the amended Act specifically reserves to them [supervisory employees] the right to join a labor organization." *NLRB* v. *Budd Mfg. Co.*, 169 F. 2d 571, certiorari denied, 335 U. S. 908.

[17] Sections 2(3) and 2(11) of the Act.

Nor is there any ambiguity in the congressional desire on this issue. Section 14(b) of the Act,[18] adopted simultaneously with 14(a), was deliberately designed to release to the states from the preemption of the Act certain other specific conduct. Congress was well aware of the complex problems affecting state jurisdiction and saw fit to adopt one approach in Section 14(a) relating to supervisors and another affecting union security agreements. When Section 14(c) was adopted in 1959, Congress again meticulously delineated the federal-state jurisdictional areas which arose after this Court's decision in *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1.

Congress was not "indifferent" to the problems affecting supervisors. On the contrary, Congress was concerned enough to express a national policy regarding supervisors, albeit it was a different policy from that which had theretofore existed under the Act. There is no suggestion in Section 14(a), or elsewhere in the Act, that having granted supervisors the right of unionization, such right would be subject to state regulation. If a state could in any way prohibit peaceful picketing by supervisors, the Section 14(a) right of supervisors to become or remain members of a union would be meaningless.

Morton[19] teaches that where Congress occupies a field or focuses upon but does not proscribe conduct, state regulation of the same type of conduct is foreclosed. By Section 14(a), Congress occupied the field of labor relations involving supervisors. Under *Morton*, proscription by the state of peaceful picketing involving the organization of

---

[18] Section 14(b) provides, "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or Territory in which such execution or application is prohibited by state or Territorial law."

[19] *Local 20, Teamsters Union* v. *Morton*, 377 U. S. 252, 260.

supervisors would "frustrate the congressional determination to leave this weapon of self-help available . . ."

House Report No. 245 on H. R. 3030 which contained in its Section 14 the identical provision of what became Section 14(a) of the Act makes the following comments on that provision:

> "As under the present act, the power of the Board under the amended act in the matter of unfair labor practices is exclusive. This rule has necessitated a special provision (sec. 13, hereafter discussed) to give to the States a concurrent jurisdiction in respect of closed-shop and other union-security arrangements. The rule of exclusive jurisdiction was developed many years ago by the Supreme Court in order to provide for uniformity in matters of national policy under the commerce clause. The Labor Act is an illustration of such a policy. It can readily be seen what mischief might be wrought if, for example, foremen should be subject to State law at the same time that the workers they supervise are subject to national law. *Moreover, the bill herewith reported very definitely states a national policy in respect of organization and collective bargaining by foremen.*" H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, 1 Leg. Hist. LMRA (1947) 331. (Emphasis added.)[20]

It is the "national policy" expressed in Section 14(a) which has the effect of precluding state action as to super-

---

[20] The Senate Report on Section 14(a) states:

> "It should be noted that all that the bill does is to leave foremen in the same position in which they were until the Labor Board reversed the position it had originally taken in 1943 in the *Maryland Drydock* case (49 N.L.R.B. 733). In other words, the bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. It merely relieves employers who are subject to the national act free from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees." S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 5, 1 Leg. Hist. LMRA (1947) 411.

visors' organizational activities where their employers are subject to the Act.

The United States acknowledges that peaceful picketing may fall "within the area which Congress has designedly left to the free play of economic forces" (Memorandum for United States, p. 7.) Peaceful picketing to effectuate the right of supervisors to belong to unions granted them by Section 14(a) is just such an area. Having removed supervisors from the Act's protection, Congress was satisfied that the free play of economic forces without state interference or the Act's protection would sustain the kind of reasonable "balance of power" between supervisors and their employers. See *Morton*, 377 U. S. at 260.

CONCLUSION

The judgment of the Supreme Court of Wisconsin should be affirmed.

September 21, 1965.

Respectfully submitted,

LEE PRESSMAN,
DAVID SCRIBNER,
50 Broadway
New York 10004, New York,
Counsel for Respondents.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended, are as follows:

SEC. 2. * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such

activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * *

SECTION 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4)(i) To engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representa-

tive of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act, (B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

* * *

SECTION 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

SUPREME COURT OF THE UNITED STATES

No. 7.—October Term, 1965.

The Hanna Mining Company et al, Petitioners, *v.* District 2, Marine Engineers Beneficial Association, AFL–CIO, et al.	On Writ of Certiorari to the Supreme Court of Wisconsin.

[December 6, 1965.]

Mr. Justice Harlan delivered the opinion of the Court.

The present controversy once again brings before the Court the troublesome question of where lies the line between permissible and federally preempted state regulation of union activities.

I.

Petitioners ("Hanna") are four corporations whose integrated fleet of Great Lakes vessels carries cargo in interstate and foreign commerce and is operated by one of the four, the Hanna Mining Company. The respondent District 2, Marine Engineers Beneficial Association ("MEBA")[1] represented the licensed marine engineers in Hanna's fleet under a collective bargaining agreement terminating on July 15, 1962. According to Hanna, while negotiations for a new contract continued during August 1962, a majority of the marine engineers informed Hanna by written petitions that they did not wish to be represented by MEBA. Hanna then declined to negotiate further until MEBA's majority status was established by

[1] The remaining respondents are officers, agents, and representatives of MEBA, and what is said of it in this opinion applies equally to them.

a secret ballot. Without acquiescing in this proposal or questioning any of the employee signatures on the petitions, MEBA responded on September 12, 1962, by picketing one of Hanna's ships unloading at a dock in Duluth, Minnesota, with signs giving the ship's name, stating that Hanna unfairly refused to negotiate with MEBA, and indicating that no dispute existed with any other employer. Because of the continued picketing, dock workers refused day after day to unload the ship. From September 12 until shipping ended for the winter, MEBA similarly picketed Hanna ships at other Great Lakes ports including Superior, Wisconsin.

Hanna turned first to the National Labor Relations Board. On September 12, it petitioned the Regional Director at Cleveland, Ohio, to hold a representation election among Hanna's engineers to prove or disprove MEBA's majority status. The petition was dismissed at the end of September on the stated ground that the engineers were "supervisors" under § 2 (11) of the National Labor Relations Act,[2] and automatically excluded from the Act's definition of "employees" under § 2 (3),[3] so election proceedings under § 9 were not warranted;[4] giv-

[2] National Labor Relations Act, as amended, § 2 (11), 61 Stat. 138, 29 U. S. C. § 152 (11) (1964 ed.), gives a functional definition of the term "supervisor."

[3] National Labor Relations Act, as amended, § 2 (3), 61 Stat. 137, 29 U. S. C. § 152 (3) (1964 ed.), provides in relevant part that the "term 'employee' . . . shall not include . . . any individual employed as a supervisor . . . ."

[4] National Labor Relations Act, as amended, § 9, 61 Stat. 143, 29 U. S. C. § 159 (1964 ed.), pertinently provides in subsection (c) that petitions may be entertained and elections ordered to determine "the representative defined in subsection (a) of this section"; and subsection (a) pertinently provides that "[r]epresentatives designated or selected . . . by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such unit" for collective bargaining purposes.

ing the same reason, the Board in November declined to overturn this decision.[5] As a second measure, Hanna on September 15, 1962, filed charges with the Regional Director in Minneapolis, Minnesota, alleging that MEBA had violated § 8 (b)(4)(B) of the Act,[6] by inducing work stoppages among dockers at Duluth through improper secondary pressure. In October, the Regional Director dismissed the charges and the General Counsel sustained the dismissal in December, stating that MEBA's conduct at Duluth and at other sites investigated did not exceed the bounds of lawful picketing under the Board's stand-

---

[5] In relevant part the Board's letter stated that as the "appeal makes no affirmative claim that a majority of the 'employees' as distinguished from 'supervisors' are sought to be represented in an appropriate unit and as a unit of supervisors is otherwise inappropriate, no question concerning representation in an appropriate unit exists." While this pronouncement could be clearer, the parties do not dispute that it affirms or refuses to disturb the Regional Director's explicit finding.

[6] National Labor Relations Act, as amended, § 8 (b)(4)(B), 73 Stat. 542, 29 U. S. C. § 158 (b)(4)(B) (1964 ed.), provides in relevant part that it shall be an unfair labor practice for a labor organization or its agents:

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to . . . transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services . . . where . . . an object thereof is—

"(B) forcing or requiring any person to cease . . . handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless . . . certified . . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

ards.[7] Hanna's third and last appeal to the Board came on September 27, 1962, when it filed charges with the Regional Director in Cleveland, Ohio, accusing MEBA of organizational or recognitional picketing improper under § 8 (b)(7) of the Act.[8] The Regional Director dismissed the charge in October and in the next two months the General Counsel affirmed the dismissal because in seeking to represent "supervisors" rather than "employees" MEBA fell outside the section.[9]

Winter brought an end to both shipping and picketing for several months but when the navigation season opened in the spring of 1963 MEBA pickets once more appeared. After picketing occurred at Superior, Wisconsin, Hanna filed suit on June 24, 1963, in a Wisconsin circuit court. The complaint and affidavits alleged that MEBA was picketing Hanna's vessels at the docks of the Great Northern Railway Company at Superior in the same manner as the 1962 picketing and with the same

[7] The letter from the General Counsel's office stated in part: "[T]he evidence revealed that the picketing by MEBA at the common situs herein conformed to Moore Dry Dock standards .... Furthermore, MEBA's activity at other sites did not evince an unlawful object on the part of the Union inconsistent with the ostensible primary object of the picketing at the situs of the dispute."

[8] National Labor Relations Act, as amended, § 8 (b)(7), 73 Stat. 544, 29 U. S. C. § 158 (b)(7) (1964 ed.), provides, excluding portions and exceptions not here relevant, that it is an unfair labor practice for a labor organization or its agents to picket any employer with an object of forcing "an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization" as their bargaining agent unless such labor organization is certified or seeks certification.

[9] A second, clarifying letter from the General Counsel's office stated in part: "Our disposition of this case was predicated solely on our conclusion that the supervisory status of the licensed engineers precluded a finding that the Union's picketing and other activity was for an object proscribed by Section 8 (b)(7) of the Act."

improper aim of forcing its representation on unwilling engineers; Hanna stated that workers of other employers were refusing to render service to Hanna's vessels and it prayed injunctive relief against further picketing of the vessels and the docks where they berthed and against any other attempt of MEBA to impose representation on Hanna engineers. The Circuit Court dismissed the suit in July for lack of jurisdiction over the subject matter. In April 1964 the Wisconsin Supreme Court affirmed the decision. 23 Wis. 2d 433, 127 N. W. 2d 393. While agreeing that the picketing could be deemed illegal under Wisconsin law,[10] that court held that the picketing arguably violated §§ 8 (b)(4)(B) and 8 (b)(7) of the federal labor Act and so fell within the Board's exclusive jurisdiction marked out in *San Diego Unions* v. *Garmon*, 359 U. S. 236. In light of other language in *Garmon* the Wisconsin Supreme Court held that the General Counsel's dismissal of charges under §§ 8 (b)(4)(B) and 8 (b)(7) did not foreclose the possibility of a preempting violation, even assuming the 1963 picketing in Superior mirrored the 1962 picketing in Duluth. We invited the views of the United States, 379 U. S. 942, granted certiorari, 380 U. S. 941, and now reverse and remand.

II.

The ground rules for preemption in labor law, emerging from our *Garmon* decision, should first be briefly summarized: in general, a State may not regulate conduct arguably "protected by § 7, or prohibited by § 8" of the National Labor Relations Act, see 359 U. S., at 244–246; and the legislative purpose may further dictate that certain activity "neither protected nor prohibited" be deemed privileged against state regulation, cf. 359

[10] See *Vogt, Inc.* v. *International Brotherhood*, 270 Wis. 321a, 74 N. W. 2d 749, aff'd *sub nom. Teamsters Union* v. *Vogt, Inc.*, 354 U. S. 284.

U. S., at 245. For the reasons that follow, we believe the Board's decision that Hanna engineers are supervisors removes from this case most of the opportunities for preemption.

When in 1947 the National Labor Relations Act was amended to exclude supervisory workers from the critical definition of "employees," § 2 (3), it followed that many provisions of the Act employing that pivotal term would cease to operate where supervisors were the focus of concern. Most obviously, § 7 no longer bestows upon supervisory employees the rights to engage in self-organization, collective bargaining, and other concerted activities [11] under the umbrella of § 8 of the Act, as amended, 61 Stat. 140, 29 U. S. C. § 158 (1964 ed.). See *Labor Board* v. *Budd Mfg. Co.*, 169 F. 2d 571. Accordingly, activity designed to secure organization or recognition of supervisors cannot be protected by § 7 of the Act, arguably or otherwise. Compare *Labor Board* v. *Drivers Local Union*, 362 U. S. 274, 279. Correspondingly, the situations in which that same activity can be prohibited by the Act, even arguably, are fewer than would be the case if employees were being organized or seeking recognition. There can be no breach of § 8 (b)(7), curtailing organizational or recognitional picketing, because there cannot exist the forbidden objective of requiring representation of "employees" by the picketing organization. Nor could one even advance the argument unsuccessfully urged in *Drivers Local Union* that § 8 (b)(1)(A), 61 Stat. 141, 29 U. S. C. § 158 (b)(1)(A) (1964 ed.), condemns the picketing as restraint or coercion of employees exercising their § 7 right *not* to organize or bargain collectively.

---

[11] National Labor Relations Act, as amended, § 7, 61 Stat. 140, 29 U. S. C. § 157 (1964 ed.), provides that "employees" shall have the right to engage in, or in general to refrain from, the mentioned activities.

Even though such efforts to unionize supervisors are not protected by the Act, or in the respects immediately relevant prohibited by it, the question arises whether Congress nonetheless desired that in their peaceful facets these efforts remain free from state regulation as well as Board authority. Compare *Teamsters Union* v. *Morton*, 377 U. S. 252, 258–260. Arguing that the States are indeed powerless in this respect, MEBA pitches its case chiefly on the 1947 amendment of the "employee" definition and on the concurrent enactment of § 14 (a) of the Act, 61 Stat. 151, 29 U. S. C. § 164 (a) (1964 ed.), which provides in relevant part that "[n]othing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization . . . ." It is contended that the amendment and this section signify a federal policy of *laissez-faire* toward supervisors ousting state as well as Board authority and, more particularly, that to allow the Wisconsin injunction would obliterate the opportunity for supervisor unions that Congress expressly reserved.

This broad argument fails utterly in light of the legislative history, for the Committee reports reveal that Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees.[12] Whether the legislators fully realized that their method of achieving this result incidentally freed supervisors' unions from certain limitations under the

[12] Summarizing the impact of the new measure on supervisory personnel, the Senate Report stated: "[T]he bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. It merely relieves employers who are subject to the national act free from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees." S. Rep. No. 105, 80th Cong., 1st Sess., p. 5. See also H. R. Rep. No. 245, 80th Cong., 1st Sess., pp. 13–17.

newly enacted § 8 (b) is not wholly clear, but certainly Congress made no considered decision generally to exclude state limitations on supervisory organizing. As to the portion of § 14 (a) quoted above, some legislative history suggests that it was not meant to immunize any conduct at all but only to make it "clear that the amendments to the act do not prohibit supervisors from joining unions . . . ." S. Rep. No. 105, 80th Cong., 1st Sess., p. 28; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 60 ("[T]he first part of this provision [§ 14 (a)] was included presumably out of an abundance of caution."). However, even assuming that § 14 (a) also itself intended to make it clear that state law could not prohibit supervisors from joining unions, the section would have no application to the present facts; for picketing by a minority union to extract recognition by force of such pressures is decidedly not a *sine qua non* of collective bargaining, as indeed its limitation by § 8 (b)(7) in nonsupervisor situations attests.

The remaining question in this phase of the case is whether the supervisory status of Hanna's engineers has been settled "with unclouded legal significance," *Garmon*, 359 U. S., at 246, so as to preclude arguable application of the Act in the respects discussed. We hold that the Board's statement accompanying its refusal to order a representation election does resolve the question with the clarity necesary to avoid preemption. While MEBA does not contend that the Board erred in its determination, an abstract difficulty arises from the lack of a statutory channel for judicial review of such a Board decision. Compare *Hotel Employees* v. *Leedom*, 358 U. S. 99 (equity action to obtain election). However, the usual deference to Board expertise in applying statutory terms to particular facts assures that its decision would in any event be respected in a high percentage of in-

stances, and so diminished a risk of interference with federal labor policy does not justify use of the preemption doctrine to thwart state regulation bound to be legitimate on this score in almost all cases.

III.

A further basis for preemption, urged by MEBA and adopted by the Wisconsin Supreme Court, is that the picketing at Superior exerted secondary pressure arguably violating § 8 (b)(4)(B). The argument appears to be that a state injunction banishing the pickets inevitably impinges upon the Board's authority to regulate facets of the picketing that might exceed "primary" picketing and violate § 8 (b)(4)(B)[13]—facets never specified by MEBA but presumably those that ignore the Board's limitations on time, location, and manner of common situs picketing. See *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N. L. R. B. 547. However, as will appear, no arguable violation exists if Hanna's proof lives up to its allegations; further, even assuming a violation, federal interests normally justifying preemption are absent from this case.

Hanna's claim that there is no arguable violation rests, of course, on the finding made by the Regional Director and General Counsel in declining to issue a complaint under § 8 (b)(4)(B) with respect to MEBA's 1962 picketing. The Wisconsin Supreme Court refused to credit this finding because of this Court's comment in *Garmon* that the "refusal of the General Counsel to file a charge" is one of those dispositions "which does not define

[13] By contrast, sometimes offensive conduct may be restrained by a state remedy that has no impact at all on related activity arguably within the Board's exclusive province. See, *e. g. Youngdahl v. Rainfair, Inc.*, 355 U. S. 131, upholding a state injunction against violence but setting it aside so far as it reached peaceful picketing.

the nature of the activity with unclouded legal significance." 359 U. S., at 245–246. This language allows more than one interpretation, but we take it not to apply to those refusals of the General Counsel which are illuminated by explanations that do squarely define the nature of the activity. The General Counsel has statutory "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints," § 3 (d) of the Act, as amended, 61 Stat. 139, 29 U. S. C. § 153 (d), and his pronouncements in this context are entitled to great weight. The usual inability of the charging party to contest the General Counsel's adverse decision in the courts, see *Hourihan* v. *Labor Board*, 201 F. 2d 187, does to be sure create a slight risk if state courts may proceed on this basis, but in the context of this case we believe the risk is too minimal to deserve recognition.

Even taking the General Counsel's ruling at face value, MEBA stresses that the § 8 (b)(4)(B) charge by Hanna concerned picketing in Duluth in September 1962 while the picketing before the Wisconsin court occurred at Superior in spring 1963. Yet Hanna accompanied the 1962 charge with information as to the 1962 picketing in several ports including Superior. The Regional Director is said to have conducted an investigation in Superior as well as in Duluth, and the General Counsel's letter on the § 8 (b)(4)(B) charge appeared to state that activity at the sites other than Duluth also did not violate the Act. See n. 7, *supra*. And while some months intervened between the fall 1962 and spring 1963 picketing in Superior, Hanna has offered to prove that the picketing remained the same in all significant respects including the picket signs employed, the location of the pickets, and the pickets' general behavior. If this proof is furnished, the chance that the picketing sought to be en-

joined conceals a § 8 (b)(4)(B) violation seems remote indeed.

Additionally, even if a § 8 (b)(4)(B) violation were present, central interests served by the *Garmon* doctrine are not endangered by a state injunction when, in an instance such as this, the Board has established that the workers sought to be organized are outside the regime of the Act. Cf. *Incres S. S. Co.* v. *Maritime Workers*, 372 U. S. 24. Most importantly, the Board's decision on the supervisory question determines, as we have already shown, that none of the conduct is arguably protected nor does it fall in some middle range impliedly withdrawn from state control.[14] Consequently, there is wholly absent the greatest threat against which the *Garmon* doctrine guards, a State's prohibition of activity that the Act indicates must remain unhampered.[15]

---

[14] Aside from the §14 (a) line of argument already answered, we do not find at all apposite *Teamsters Union* v. *Morton*, 377 U. S. 252, holding a State powerless to award damages against a striking union for requesting a secondary employer to cease business with the struck employer. While in *Morton* preemption was premised on the fact that the secondary pressure did not come within the ban fixed by § 8 (b)(4)(B) and adopted by § 303 (a) of the Labor Management Relations Act, as amended, 73 Stat. 545, 29 U. S. C. § 187 (a) (1964 ed.), the conduct there occurred in the context of a peaceful economic strike by employees, a sphere in which the federal interest is especially pervasive. By contrast the present case, involving secondary pressure wielded to impose representation on unwilling supervisors, finds itself at that far corner of labor law where, as we have shown, federal occupation is at a minimum and state power at a peak.

[15] *Hattiesburg Unions* v. *Broome Co.*, 377 U. S. 126, cited to us by MEBA, may illustrate this concern. There, the union's organizational picketing at a common situs was enjoined by the State because its objective violated state law. In urging that the picketing's possible violation of § 8 (b)(4)(B) preempted state authority, the Solicitor General suggested that it may also have been "lawful picketing" outside the State's reach so far as not prohibited by the

Nor is this a case in which the presence of arguably prohibited activity may permit the Board to afford complete protection to the legitimate interests advanced by the State. Since Hanna as the primary employer is present at the picketed situs, the primary picketing proviso of § 8 (b)(4)(B) severely inhibits the Board's use of that section to reach the volatile core of the conduct, the impact on secondary employers that follows from the mere presence of the pickets at a common situs. Section 8 (b)(7) which might provide full relief is rendered inapplicable by the supervisor ruling. Thus, so far as *Garmon* may proceed on the view that the opportunity belongs to the Board wherever it and the State offer duplicate relief, it has limited application to the present facts.[16]

In concluding that the Act does not preempt the State's authority to quench the picketing said to have occurred in this case, we do not retreat from *Garmon*. Rather, we consider that neither the terms nor the policies of that decision justify its extension to the present facts, an extension producing untoward results

---

section. Memorandum, p. 6, n. 7. See also Michelman, State Power To Govern Concerted Employee Activities, 74 Harv. L. Rev. 641, 652–653 (1961) (citations omitted): "[A] state generally may not enjoin conduct thought to be a federal unfair labor practice. The reason is that, despite the state court's contrary belief, the conduct may, as a matter of federal law, be privileged."

[16] In *Marine Engineers* v. *Interlake Co.*, 370 U. S. 173, we overturned a state ban on picketing arguably violating § 8 (b)(4)(B); and to the counter that the picketing group was not a "labor organization" subject to § 8 (b), we pointed out that this decision was for the Board. Unlike the present case, in *Interlake* the § 8 (b)(4)(B) remedy had not been tried; but quite apart, had the Board held the union a "labor organization" and also held those being organized to be "employees"—another point not recently decided by the Board—complete relief against the picketing might well have been available under § 8 (b)(7). See 370 U. S., at 182–183.

noted by the Wisconsin Supreme Court itself. 23 Wis. 2d 433, 446, 127 N. W. 2d 393, 399.

The judgment of the Supreme Court of Wisconsin is reversed and the case is remanded to that court for proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 7.—October Term, 1965.

The Hanna Mining Company et al, Petitioners, *v.* District 2, Marine Engineers Beneficial Association, AFL–CIO, et al.	On Writ of Certiorari to the Supreme Court of Wisconsin.

[December 6, 1965.]

Mr. Justice Brennan, concurring.

I agree with the Court that § 14 (a) does not evince a congressional decision to exclude state regulation of picketing aimed at organizing supervisors and securing the employer's recognition of the union. The question, here, however, is whether Congress has excluded state regulation when that picketing also has secondary aspects arguably within the reach of § 8 (b)(4)(B). I agree with the Court that state regulation is likewise not precluded in such case.

The proviso to § 8 (b)(4)(B) expressly states "that nothing contained in this clause (B) shall be construed to make unlawful, *where not otherwise unlawful*, any primary strike or picketing." (Emphasis supplied.) While Congress thus provided that primary picketing is not rendered unlawful under the Act merely by having secondary aspects, the italicized words of the proviso evince a congressional intention to leave undisturbed whatever other provisions of law regulate primary picketing. Ordinarily such regulation occurs under the National Labor Relations Act. The primary aspects of supervisory picketing are not, however, regulated by the federal Act; and I think the assumption that regulation will occur, which underlies the italicized words of the

proviso, is strong enough to support the Court's conclusion that state regulation of supervisory organizational picketing is not preempted.*

It is true that we said in *Garmon* that States have no power to regulate "activities" arguably subject to the federal Act; picketing which, because of its secondary aspects, is arguably subject to § 8 (b)(4)(B) is, by our construction, an "activity." But *Garmon* was not a case in which only incidental aspects of picketing were arguably subject to federal power and in which the alternative to state regulation was a regulatory void which Congress plainly assumed would not exist. In this limited context, it is permissible to distinguish the primary from the secondary aspects of the picketing, and hold that the States may regulate the former, although preempted as to the latter, and although the necessary effect of regulation curbs both secondary and primary aspects of the picketing. This choice seems more consistent with the congressional meaning, since the alternative is to immunize the primary aspects of such common-situs picketing from state regulation, and that alternative finds no support either in policy or in the statute. Thus, I think that the Wisconsin courts may consider so much of the complaint as is addressed to the primary aspects of MEBA's picketing.

*It could be argued that this assumption supports a scope of state regulation no broader than that ordinarily provided by the federal Act. It is not necessary to resolve that argument here.